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No.

In the Supreme Court of the United States

October Term, 1983

BURGER KING CORPORATION,
a Florida corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED IN HOLDING UNCONSTITUTIONAL, AS VIOLATIVE OF THE FOURTEENTH AMENDMENT DUE-PROCESS CLAUSE, SECTION 48.193(1)(g) OF THE FLORIDA STATUTES, WHICH CONFERS LONG-ARM JURISDICTION UPON ONE WHO BREACHES A CONTRACT IN FLORIDA BY FAILING TO PERFORM ACTS REQUIRED BY THE CONTRACT TO BE PERFORMED IN FLORIDA.

LIST OF PARTIES

PURSUANT TO RULES 15 AND 28.1 OF THE RULES OF THE SUPREME COURT, THE APPELLANT CERTIFIES THAT THE PARTIES TO THIS APPEAL ARE APPELLEE JOHN RUDZEWICZ—DEFENDANT IN THE TRIAL COURT AND APPELLANT IN THE CIRCUIT COURT; AND APPELLANT BURGER KING CORPORATION—PLAINTIFF IN THE TRIAL COURT AND APPELLEE IN THE CIRCUIT COURT. BURGER KING CORPORATION IS A WHOLLY-OWNED SUBSIDIARY OF THE PILLSBURY COMPANY, WITH NO SUBSIDIARIES OR AFFILIATES.

PURSUANT TO RULE 28.4(c) OF THE RULES OF THE SUPREME COURT, THE APPELLANT HEREBY RECITES THAT 28 U.S.C. §2403(b) MAY BE APPLICABLE TO THIS CASE, AND THAT A COPY OF THIS JURISDICTIONAL STATEMENT HAS BEEN SERVED UPON THE ATTORNEY GENERAL OF THE STATE OF FLORIDA. TO THE APPELLANT'S KNOWLEDGE, NO COURT INVOLVED IN THE INSTANT ACTION HAS CERTIFIED TO THE FLORIDA ATTORNEY GENERAL THE FACT THAT THE CONSTITUTIONALITY OF A FLORIDA STATUTE IS DRAWN IN QUESTION.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW I
LIST OF PARTIES II
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISION AND FLORIDA STATUTE 2
STATEMENT OF THE CASE 3
1. The Facts 3
2. The Federal Question 6
3. The Decision Below 7
THE QUESTION IS SUBSTANTIAL 13
CONCLUSION 29

TABLE OF CASES AND AUTHORITIES

A. F. Briggs Co. v. Starrett Corp., 329 A.2d 177 (Me. 1974) 15
Aetna Life Ins. Co. v. Dunben, 266 U.S. 389 (1924) 22
Ajax Realty Corp. v. J. F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) 19
Altech Industries, Inc. v. Al Tech Specialty Steel Corporation, 528 F. Supp. 521 (D. Del. 1981) 28
Bangor Punta Operations, Inc. v. Universal Marine Co., Ltd., 543 F.2d 1107 (5th Cir. 1976) 29
Bard Bldg. Supply Co., Inc. v. United Foam Corp., 137 Vt. 125, 400 A.2d 1023 (1979) 15
Black v. Acme Markets, Inc., 564 F.2d 681 (5th Cir. 1977) 28

Burger King Corporation v. MacShara, 724 F.2d 1505 (11th Cir. 1984) 1
Burstein v. State Bar of California, 693 F.2d 511 (5th Cir. 1982) 28, 29
Calder v. Jones, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4349) 9, 21, 23
California v. Grace Brethren Church, 457 U.S. 393 (1982) 12
Carroll Associates, Inc. v. Video Applications, Inc., 421 So.2d 3 (Fla. 5th DCA 1982) 11
Chen v. Watter, 421 So.2d 771 (Fla. 4th DCA 1982) 11
City of Detroit v. Murray Corp. of America, 355 U.S. 489 (1958) 11
Cleverock Energy Corp. v. Trepel, 609 F.2d 1358 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980) 19
Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972) 22
Commercial Discount Corp. v. King, 515 F. Supp. 988 (N.D. Ill. 1981) 19
Continental American Corp. v. Camera Controls Corp., 692 F.2d 1309 (10th Cir. 1982) 18, 23, 26, 27
Cook Associates, Inc. v. Colonial Broach & Machine Corp., 14 Ill. App.3d 965, 304 N.E.2d 27 (1973) 15
Cross v. Del Webb's Hotels, Inc., 482 F. Supp. 664 (E.D. Tex. 1979) 19
Delray Beach Aviation Corp. v. Mooney Aircraft, Inc., 332 F.2d 135 (5th Cir.), *cert. denied*, 379 U.S. 915 (1964) 9
DeMelo v. Toche Marine, Inc., 711 F.2d 1260 (5th Cir. 1983) 29
Dutton v. Evans, 400 U.S. 74 (1970) 11
Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365 (8th Cir. 1969) 17, 18, 23, 25, 26, 27

Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc., 415 So.2d 114 (Fla. 3rd DCA 1982) 10, 22
Erie Press Systems, a Division of EFCO, Inc. v. Shultz Steel Co., 548 F. Supp. 1215 (W.D. Pa. 1982) 19, 26
Esberger v. First Florida Business Consultants, Inc., 338 So.2d 561 (Fla. 2nd DCA 1976) 9
Estin v. Estin, 334 U.S. 541 (1948) 16
Federal National Bank & Trust Co. of Shawnee v. Moon, 412 F. Supp. 644 (W.D. Okla. 1976) 18
Federal Trade Commission v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981) 28
Federal-Mogul-Bower Bearings, Inc. v. Azoff, 313 F.2d 405 (6th Cir. 1963) 28
First National Bank of Kansas City v. Ward, 380 F. Supp. 782 (W.D. Mo. 1974) 18, 24
First Wyoming Bank v. Trans. Mt. Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979) 15
Fleming v. Rhodes, 331 U.S. 100 (1947) 11-12
Flying Saucers, Inc. v. Moody, 421 F.2d 884 (5th Cir.), *cert. denied*, 398 U.S. 904 (1970) 9
Geneva Industries, Inc. v. Copeland Construction Corp., 312 F. Supp. 186 (N.D. Ill. 1970) 25
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 26
Guritz v. American Motivate, Inc., 386 So.2d 60 (Fla. 2nd DCA 1980) 11
Hanson v. Denckla, 357 U.S. 235 (1958) 16, 21, 24
Helicopteros Nationales De Colombia, S.A. v. Hall, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4491) 24
Holderness v. Hamilton Fire Ins. Co., 54 F. Supp. 145 (S.D. Fla. 1944) 22
Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943) 23

Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), *U.S. appeal pending* 28
In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972) 19, 23, 24, 25, 27
International Merchandising Associates, Inc. v. Lighting Systems, Inc., 20 Ill. Dec. 838, 64 Ill. App.3d 346, 380 N.E.2d 1047 (1978) 15
International Shoe Co. v. Washington, 326 U.S. 310 (1945) 16
Jadair, Inc. v. Van Lott, Inc., 512 F. Supp. 1141 (E.D. Wisc. 1981) 19, 22, 27
Kaulko v. Superior Court of California in and for the City and County of San Francisco, 436 U.S. 84 (1978) 9, 16, 22, 23
Keeton v. Hustler Magazine, Inc., ... U.S. ....., ... S. Ct. ..... (52 LW 4346) 9, 21, 23, 26
Lapeyrouse v. Texaco, Inc., 693 F.2d 581 (5th Cir. 1982) 29
Leroy v. Great Western United Corp., 443 U.S. 173 (1979) 26
Lieb v. American Pacific International, Inc., 489 F. Supp. 690 (E.D. Pa. 1980) 26, 27
Lyster v. Round, 276 So.2d 186 (Fla. 1st DCA), *cert. denied*, 283 So.2d 105 (Fla. 1973) 9
Madax International Corp. v. Delcher Intercontinental Moving Services, Inc., 342 So.2d 1082 (Fla. 2nd DCA 1977) 11, 22
Manufacturers' Lease Plans, Inc. v. Alverson Draughon College, 115 Ariz. 358, 565 P.2d 864 (1977) 15
Marathon Metallic Building Co. v. Mountain Empire Construction Co., 653 F.2d 921 (5th Cir. 1981) 12, 18
Marshall Egg Transport Co. v. Bender Goodman Co., 275 Minn. 534, 148 N.W.2d 161 (1967) 25
May v. Anderson, 345 U.S. 528 (1953) 9

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 16, 17, 21, 27
McLucas v. De Champlain, 421 U.S. 21 (1975) 11
Milliken v. Meyer, 311 U.S. 457 (1940) 16
Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003 (5th Cir. 1982) 18, 25, 27
Mitchim v. Mitchim, 518 S.W.2d 362 (Tex. Supp. 1975) 15
Mouzavires v. Baxter, 434 A.2d 988 (D.C. App. 1981), *cert. denied*, 455 U.S. 1006 (1982) 15
Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1949) 27
New Orleans v. Dukes, 427 U.S. 297 (1976) 11
Nordberg Division of Rex Chainbelt, Inc. v. Hudson Engineering Corp., 361 F. Supp. 903 (E.D. Wisc. 1973) 25
Norman M. Morris Corp. v. Weinstein, 466 F.2d 137 (5th Cir. 1972) 28
O'Hare International Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971) 17, 19, 20, 22, 23
Osborn v. University Society, Inc., 378 So.2d 873 (Fla. 2nd DCA 1979) 11
Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977) 17, 18, 27
Pennoyer v. Neff, 95 U.S. 714 (1878) 27
Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) 16
Proctor & Schwartz, Inc. v. Cleveland Lumber Co., 228 Pa. Super. 12, 323 A.2d 11 (1974) 15
Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974) 8, 17, 19, 27
Professional Patient Transportation, Inc. v. Fink, 365 So.2d 209 (Fla. 3rd DCA 1978) 11
Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975) 9, 29

Rosen v. Solomon, 374 F. Supp. 915 (E.D. Pa. 1974), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975) 22, 26, 27
Saf-T-Clean, Inc. v. Martin-Marietta Corp., 197 So.2d 8 (Fla. 1967) 22
Scordilis v. Drobnicki, 443 So.2d 411 (Fla. 4th DCA 1984) 11
Scullin Steel Co. v. National Railway Utilization Corp., 676 F.2d 309 (8th Cir. 1982) 28
Shaffer v. Heitner, 433 U.S. 186 (1977) 16, 23
Shealy v. Challenger Mfg. Co., 304 F.2d 102 (4th Cir. 1962) 26
Simon v. United States, 644 F.2d 490 (5th Cir. 1981) 29
Snyder v. Hampton Industries, Inc., 521 F. Supp. 130 (D. Md. 1981) 19
Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968) 17, 23, 26, 27
Southwest Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149 (5th Cir. 1980) 19, 20, 25, 26, 27
Spencer Boat Co., Inc. v. Liutermoza, 498 F.2d 332 (5th Cir. 1974) 9
Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976) 25
Standard Fittings Co. v. Sapag, S.A., 625 F.2d 630 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981) 19, 27
Standard Leasing Co. v. Performance Systems, Inc., 321 F. Supp. 977 (N.D. Tex. 1971) 18, 26
Standard Life & Accident Ins. Co. v. Western Finance, 436 F. Supp. 843 (W.D. Okla. 1977) 19
Telco Leasing, Inc. v. Marshall County Hospital, 586 F.2d 49 (7th Cir. 1978) 28
Third National Bank in Nashville v. Hardi-Gardens Supply of Illinois, 380 F. Supp. 930 (M.D. Tenn. 1974) 19
Thompson v. King, 523 F. Supp. 180 (M.D. Fla. 1981) 11, 18, 25

Thorington v. Cash, 494 F.2d 582 (5th Cir. 1974) 29
Travelers Health Association v. Commonwealth of Virginia at the Relation of the State Corporation Commission, 339 U.S. 643 (1949) 17, 23
United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962) 11
United States Railway Equipment Co. v. Port Huron and Detroit R. Co., 495 F.2d 1127 (7th Cir. 1974) 22, 25
United States v. American Friends Service Committee, 419 U.S. 7 (1974) 11
United States v. Christian Echoes National Ministry, Inc., 404 U.S. 561 (1972) 12
United States v. Clark, 445 U.S. 23 (1980) 11, 12
United States v. Darusmont, 449 U.S. 292 (1981) 11
United States v. Knox, 396 U.S. 77 (1969) 12
United States v. Raines, 362 U.S. 17 (1960) 12
Uvalde Rock Asphalt Co. v. Consolidated Carpet Corp., 457 S.W.2d 649 (Tex. Civ. App. Beaumont 1970) 15
Vena v. Western General Agency, Inc., 543 F. Supp. 779 (N.D. Ill. 1982) 19, 25
Vishay Intertechnology, Inc. v. Delta International Corp., 696 F.2d 1062 (4th Cir. 1982) 18, 23, 24, 26-27
Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974) 28
Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. 1978) 22
Wilks v. Swift and Co., 382 So.2d 1364 (Fla. 1st DCA 1980) 11
William E. Strasser Construction Corp. v. Linn, 97 So.2d 458 (Fla. 1957) 9
Williams v. Aeroland Oil Co., 155 Fla. 114, 20 So.2d 346 (1944) 22

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 16, 23

United States Constitution, Fourteenth Amendment 2
15 U.S.C. §1116 ..... 6, 28
15 U.S.C. §1121 1
18 U.S.C. §3731 12
28 U.S.C. §1252 ..... 11, 12
28 U.S.C. §1254(2) 2, 11
28 U.S.C. §1332 1
28 U.S.C. §1338 1
Rules of the Supreme Court, Rule 13 1
Rules of the Supreme Court, Rule 15.1(e)(iii) 2
Fed. R. Civ. P., Rule 4(e) 28, 29
ALASKA STAT. §09.05.015(5) (1983) 13
DEL. CODE ANN. tit.10, §3104 (1975) 13
FLA. STAT. §48.193 (1983) 2
FLA. STAT. §48.193(1) (1981) 3
FLA. STAT. §48.193(1)(b) 6, 7, 29
FLA. STAT. §48.193(1)(g) 1, 3, 10, 11, 28
IOWA CODE ANN. §617.3 (West Supp. 1982) 13
KANSAS STAT. ANN. §60-308(b)(5) (1983) 13
KY. REV. STAT. §454.210(2)(a)(2) (Baldwin 1979) 13
LA. REV. STAT. ANN. §13:3201(b) (West 1968) 13
MASS. GEN. LAWS ANN. ch.223A, §3(b) (West 1958; Supp. 1983) 14
MD. CTS. JUD. PROC. CODE ANN. §6-103(b) (1974) 14
ME. REV. STAT. ANN. tit.14, §704-A (1980) 13
MICH. COMP. LAWS §600.705(5) (1975) 14
MISS. CODE 1972 tit.13, §13-3-57(1) (Supp. 1983) 14
MO. REV. STAT. §506.500.1(2) (1967) 14
N.C. GEN. STAT. §1-75.4(5) (1983) 14
N.Y. CIV. PRAC. LAW §302(a)(1) (McKinney 1982) 14

NEB. REV. STAT. §25-536(b) (1979) 14
OHIO REV. CODE ANN. §2307.38.2(A)(2) (Page 1981) 14
OKLA. STAT. ANN. tit.12, §1701.3 (West 1980) 14
PA. CONS. STAT. ANN, tit.42, §5322 (Purdon 1981; Supp. 1983) 14
S.C. CODE ANN. §36-2-803(1)(g) (Law. Co-op. 1977) 14
S.D. CODIFIED LAWS ANN. §47-8-17 (1983) 14
TENN. CODE ANN. §20-2-214(5) (1980) 14
TEX. REV. CIV. STAT. ANN. art.2031b(4) (Vernon 1964) 14
UTAH CODE ANN. §28-27-24(2) (1977) 14
VA. CODE §8.01-328.1(2) (Supp. 1983) 14
W. VA. CODE §56-3-33(a)(2) (Supp. 1983) 14
WIS. STAT. ANN. §801.05 (West 1977) 14
Alabama R. Civ. P., Rule 4.2(2)(B) 13
Alabama R. Civ. P., Rule 4.2(2)(I) 13
Arizona R. Civ. P., Rule 4(e)(1) 13
Montana R. Civ. P., Rule 4B(1)(e) 14
North Dakota R. Civ. P., Rule 4(b)(2)(B) 14
Oregon R. Civ. P., Rule 4E.(1) 14
1 MOORE'S FEDERAL PRACTICE ¶0.145[5], at 1628-29 (2nd ed. 1980) 22
Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) 27
Developments in the Law—State Court Jurisdiction, 73 HARV. L. REV. 909 (1960) 27

JURISDICTIONAL STATEMENT

Burger King Corporation, a Florida corporation, appeals from the decision of the United States Court of Appeals, Eleventh Circuit, entered on February 13, 1984, and rendered by denial of rehearing on March 22. It holds that §48.193(1)(g) of the FLORIDA STATUTES—conferring long-arm jurisdiction upon a non-resident who breaches a contract in Florida by failing to perform acts required by the contract to be performed in Florida—is unconstitutional as violative of the appellee's right of due process.

OPINION BELOW

The opinion of the circuit court is reported as *Burger King Corporation v. MacShara*, 724 F.2d 1505 (11th Cir. 1984), and appears in the appendix at A1.[1] The district court's Findings of Fact and Conclusions of Law and Order Thereon appear at A23, the Final Judgment at A35; neither are reported.

JURISDICTION

This was an action growing out of a franchise relationship, and the district court's jurisdiction was invoked on the basis of diversity of citizenship under 28 U.S.C. §1332; as well as federal-question jurisdiction under the federal trademark laws, *see* 15 U.S.C. §1121 and 28 U.S.C. §1338 (R. 1).[2] The decision and opinion of the circuit court were

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1. The appellee's co-defendant at the trial, Brian MacShara, did not appeal the judgment of the district court, *see* A3 n.1, and is not a party to this proceeding.

2. "R." refers to the Record on Appeal in the circuit court. "Tr." refers to Volumes V-VII of the Record on Appeal—consisting of the separately-paginated transcript of the trial in this case. "X." refers to trial exhibits. The appellant has not requested that the clerk of the circuit court certify and transmit the record to this Court under Rule 13 of the Rules of the Supreme Court, but will do so should any of the factual allegations contained in this Jurisdictional Statement be controverted.

entered on February 13, 1984 (A1). A timely petition for rehearing and suggestion for rehearing en banc were entertained and denied on March 22 (A37). The circuit court's judgment issued May 7 (A39). The appellant's notice of appeal was filed in the circuit court on May 21, 1984 (A41), within 90 days of that court's denial of rehearing (A37). This appeal is being docketed in this Court within the same 90 days.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2). Pursuant to Rule 15.1(e)(iii) of the Rules of the Supreme Court, we do not deem it necessary in this paragraph to offer authority that the circuit court did indeed declare a provision of the FLORIDA STATUTES unconstitutional, and thus that this Court has jurisdiction under 28 U.S.C. §1254(2). We will do so in our Statement of the Case below.

CONSTITUTIONAL PROVISION AND FLORIDA STATUTE

Fourteenth Amendment, United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Section 48.193, FLA. STAT. (1983):

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
>
> • • •
>
> (b) Commits a tortious act within this state.
>
> • • •

> (g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.[3]

STATEMENT OF THE CASE

1. The Facts.

Except for a few omissions, the facts of this case are fairly presented in the majority and the dissenting opinions of the circuit court; where appropriate we will reference additional evidence in the Record on Appeal. Mr. Rudzewicz and his co-defendant, both Michigan residents, purchased a Burger King franchise to be operated in Michigan, in May of 1979. Burger King is incorporated and headquartered in Florida. All relevant documents were mailed to the franchises from Miami, and were returned to Burger King in Miami. The franchise agreements required the franchises to remit all rent, royalties, tax refunds and other designated fees to Burger King headquarters in Miami. The appellant's co-franchisee attended courses at Burger King University in Florida. In addition, the contracts called for the application of Florida substantive law.

All of the above facts are stated in the majority opinion, which also acknowledges that Mr. Rudzewicz is the "senior partner in a Michigan accounting firm . . . ." 724 F.2d at 1506 (A2). That firm employs 50 people, and in fact represents three Burger King franchises (Tr. 425, 479). Mr. Rudzewicz' job is to give financial advice to individuals; at the time of trial he was making over $170,000.00 a year, with a net worth of over $1,000,000.00 (Tr. 434-36). He was not solicited by Burger King for

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3. Burger King's complaint in this case was filed in May of 1981 (R. 1). Section 48.193(1), FLA. STAT. (1981) is identical to the present statute quoted above. The circuit court's opinion merely refers to "Fla. Stat. §48.193 (1)(g)" (A7 & n.7).

this venture—but by his prospective partner Brian MacShara (Tr. 476). The two sought Burger King's "approval for franchise" (Tr. 42)—and their application was "approved" (Tr. 45, 481). In no sense was Mr. Rudzewicz an unsophisticated consumer enticed or victimized by oppressive corporate practices.[4]

To the contrary, Mr. Rudzewicz knew or should have known that his subjection to the jurisdiction of a Flordia court was not in the least fortuitous. Burger King's affidavit (R. 183-87) established without contradiction that Burger King is a Florida corporation with its principal place of business, its national headquarters, and its business records and documents in Miami; that under the franchise and lease agreements with Burger King, Mr. Rudzewicz was obligated to pay Burger King all royalties, fees for a variety of services, taxes, and a monthly rental; that all royalties were required to be mailed to Burger King in Miami; that the lease agreement expressly provided that rental payments be made to Burger King in Miami (*see* X. 9 at 21 or R. 53); that payments by Mr. Rudzewicz for the purchase of materials and supplies from Burger King's Davmor division were required to be made to Burger King

4. The majority's opinion—while ostensibly restricted to the question of personal jurisdiction—contains a number of gratuitous observations about Burger King's business practices. We feel it inappropriate to address these observations here, but will do so if permitted to brief the case on the merits. We merely note our strenuous disagreement with the majority's assertions that Burger King "persuaded" the franchisees to acquire an existing store instead of building one (A4); that it "convinced" them to purchase equipment before the rental charge had been computed (id.); that the "undisputed and uncontradicted" evidence is that the franchisees' rent was computed in a manner identical to the computation for a new building (A5, n.4); and that Burger King's Michigan office was responsible for "all" consultation with the franchise (A5-6). These are all the statements of an advocate—not of an appellate court charged to view the evidence in the light most favorable to the factfinder's conclusions. If permitted to brief this case, we will cite the substantial contradictory evidence on each of these points.

in Miami; that payments to Burger King for taxes under the franchise and lease agreements were to be mailed to Burger King in Miami; that co-defendant Brian MacShara had attended the Burger King University operations course located in Miami; and that the franchise agreement itself declares that it was made and entered into in Miami (X. 8 at 1 or R. 17), and became valid when executed and accepted by Burger King in Miami (X. 8 at 11 or R. 27).

In addition, the preliminary agreement signed by Mr. Rudzewicz declares that it was "made and entered into at Miami, Dade County, Florida" (X.3 at 1 or R. 14). The lease agreement calls for the application of Florida substantive law, and in addition provides that in the event of arbitration, such arbitration will be held in Miami (X. 9 at 21 or R. 53). It also provides that all required notices must be sent to Miami (*id.*). Likewise, the franchise agreement "shall be governed and construed under and in accordance with the laws of the State of Florida" (X. 8 at 11 or R. 27).[5]

Burger King brought this action after the franchisees defaulted in their payments, but only after 16 months of attempting without success to reach accommodation (*see* X. 16 or R. 59; Tr. 74, 125-27, 131, 133, 141-42, 166, 395). The complaint expressly charged a breach of contract

5. Mr. Rudzewicz himself acknowledged that both the lease agreement and the franchise agreement were signed first by Mr. Rudzewicz and his co-franchisee in Michigan, and only then sent to Burger King in Miami, where they were signed and sent back to Michigan (Tr. 201-02). In addition, Burger King offered its own testimony that the franchise agreement was signed by Burger King in Miami only after it was signed by the franchisees in Michigan; that all royalties, rental payments, tax payments, and payments for ordered goods were required to be mailed to Burger King in Miami; and that it was Burger King's computer in Miami which determined all arrearages (Tr. 85-86, 161-62, 201, 314-15). Mr. Rudzewicz' appellate brief expressly acknowledged (p. 6) that the franchisees did in fact make payments to Burger King in Miami.

"within this district court" in the failure to make payments "at plaintiff's place of business in Miami, Dade County, Florida" (R. 2; *see* R. 5); but it also charged the tortious act of trademark infringement (R. 8-13)—alleged to cause Burger King economic harm (R. 12)—and in this connection it sought injunctive relief (R. 13). Of course, the complaint specified Burger King's principal location in Miami (R. 1)—the place of injury.[6]

The trial court found for Burger King on the contract claims (A31). It also made a specific finding that the franchisees' continued use of Burger King's tradenames and marks constituted infringement, and awarded the injunctive relief requested (A33). Before the appeal, however, Mr. Rudzewicz compromised and waived his right of appeal on this claim, specifically conceding his improper use of Burger King's tradenames and marks (R. 804). This was part of a comprehensive settlement agreement under which the franchisees gave up possession of the store. Thus, none of the infringement claims, or the jurisdictional bases for their consideration, were before the circuit court on appeal.

2. The Federal Question.

Early in the proceedings, Mr. Rudzewicz filed a motion for summary judgment or dismissal, raising the question of personal jurisdiction under the Florida long-arm statute (A43, R. 123-24). Regarding jurisdiction, the motion said nothing about Burger King's charge of tortious conduct in the form of trademark infringement, or about §48.193(1)(b) of the FLORIDA STATUTES or 15 U.S.C. §1116. There fol-

6. As we have noted, §48.193(1)(b), FLA. STAT., confers long-arm jurisdiction over a non-resident who commits a tortious act in Florida. Moreover, 15 U.S.C. §1116—governing injunctions issued to prevent a trademark violation—allows nationwide service of process in that respect.

lowed memoranda and affidavits on both sides (R. 121-22, 126-27, 130-31, 132-36, 141-42, 143-44, 154-87). The trial court eventually denied the motion, citing five unreported federal and state trial-level decisions involving Burger King in which the identical jurisdictional argument about the contract claims had been rejected (A21, R. 201-02). Copies of these decisions are found at R. 171-82. Mr. Rudzewicz raised the issue again in his appellant's brief in the circuit court, and it was the sole basis for the circuit court's reversal of the judgment below. He raised no contention that the trial court lacked jurisdiction over the infringement claims.

3. The Decision Below.

On appeal, the majority panel focused on the difficult question of whether or not it was unfair or surprising to subject Mr. Rudzewicz to the jurisdiction of the Florida court under the circumstances of this case. The majority opinion says absolutely nothing about Burger King's trademark claims, or about their invocation of jurisdiction under either §48.193(1)(b), FLA. STAT., or federal law. Instead, the opinion treats only the contract claims, concluding that nothing in the course of negotiations regarding this franchise agreement gave Mr. Rudzewicz any reason to anticipate the prospect of a suit outside of Michigan; that the negotiations took place in Michigan and the franchise was located in Michigan; that the operation of the business itself required no performance in Florida; that many services were provided the franchisees by Burger King's local Michigan district office; that the necessity of litigating in Florida would be financially and tactically harmful to Mr. Rudzewicz; that he lacked sufficient bargaining power to extract some compensation for the prospect of such litigation out of state; that the contract's application of Florida substantive law was not sufficient to

provide notice of the potential for litigation in Florida; and that the co-franchisee's attendance at Burger King University in Florida cannot be attributed to Mr. Rudzewicz because he and his co-franchisee did not have a formal partnership relationship.

As a predicate for this conclusion, the majority opinion expressly acknowledges Mr. Rudzewicz' concession that his activities in this case "fall within the reach of the Florida long-arm statute, Fla. Stat. §48.193(1)(g)" (A7). Nevertheless, the majority opinion holds that enforcement of the statute violated Mr. Rudzewicz' right to procedural due process, because "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process (A18)." In this light, the panel decision in this case necessarily declared the Florida statute to be unconstitutional—at least as applied. As the court noted in *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974):

> The case *sub judice* illustrates the difference between deciding that the Texas Long-arm Statute will by its own terms reach far enough to cover a non-resident defendant and determining whether the statutory stretch may be hamstrung by federal constitutional limitations. We think it is beyond serious dispute that [the defendant] was within the literal grasp of [the statute]. . . . Thus the district court had jurisdiction over the person of [the defendant] if the operation of the statute would not offend traditional constitutional requirements.

Likewise in this case, it is beyond serious dispute that Mr. Rudzewicz' conduct fell within the literal grasp of the statute. This is not a case in which the statute either was construed below, or can be construed, to avoid the perceived constitutional infirmity. The Florida long-arm statute contains no instruction that it be construed in accordance with constitutional limitations.[7] Of course, this Court has held repeatedly that statutes should be construed if possible to avoid constitutional infirmities; but "those cases say nothing about whether a particular enactment is coextensive with the constitutional limits."[8] In Florida, the rule is that jurisdictional statutes must be strictly construed according to their plain language.[9]

Of course, where a particular long-arm statute is ambiguous—for example a typical "doing business" statute—even the Florida courts would construe the statute mindful of constitutional requirements.[10] But at the very least, any attempt to attribute constitutional strictures to a statute must be informed by its plain language—and the plain language of this statute creates long-arm jurisdiction *whenever* a non-resident fails "to perform acts required by the contract to be performed in this state."[11]

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7. Compare the state statutes at issue in *Calder v. Jones*, ____ U.S. ____, ____ S. Ct. ____ (1984) (52 LW 4349, 4350 n.5), *Kaulko v. Superior Court of California in and for the City and County of San Francisco*, 436 U.S. 84, 90 n.4 (1978), and *May v. Anderson*, 345 U.S. 528 (1953).

8. *Spencer Boat Co., Inc. v. Liutermoza*, 498 F.2d 332, 333 n.2 (5th Cir. 1974).

9. *See William E. Strasser Construction Corp. v. Linn*, 97 So.2d 458, 459 (Fla. 1957); *Esberger v. First Florida Business Consultants, Inc.*, 338 So.2d 561, 562 (Fla. 2nd DCA 1976); *Lyster v. Round*, 276 So.2d 186, 188 (Fla. 1st DCA), cert. denied, 283 So.2d 105 (Fla. 1973). *See also Spencer Boat Co., Inc. v. Liutermoza*, 498 F.2d 332, 333 (5th Cir. 1974) (Florida law). Compare the case-law governing the state statute at issue in *Keeton v. Hustler Magazine, Inc.*, ____ U.S. ____, ____ S. Ct. ____ (52 LW 4346, 4347 & n.4).

10. *See Flying Saucers, Inc. v. Moody*, 421 F.2d 884, 887 (5th Cir.), cert. denied, 398 U.S. 904 (1970); *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135, 137 (5th Cir.), cert. denied, 379 U.S. 915 (1964). *Cf. Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1212 (5th Cir. 1975).

11. If this were not the case—if every jurisdictional statute were held irrespective of its language to embrace an implicit

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Thus, confronted with the argument that §48.193(1)(g) should be construed to include a requirement of "other minimum contacts," one Florida court responded: "A reading of the statute to require the doing of more than one of the enumerated acts, even for the limited purpose of avoiding a perceived constitutional problem, would be strained."[12] The same court continued, *id.* at 114:

> Florida courts have jurisdiction over the parties and subject matter in a suit brought by a resident plaintiff against a nonresident defendant for failure of defendant to perform acts required by the contract to be performed in this state, provided only that the nonresident defendant has been properly served. . . .
>
> Where jurisdiction over the party is satisfied pursuant to Section 48.193(1)(g), the court need not determine whether the defendant also operates, conducts, engages in, or carries on a business in the state pursuant to Section 48.193(1)(a), Florida Statute (1979). [Citations omitted]. The statute plainly states that by doing any one of the acts enumerated, a nonresident person submits to the jurisdiction of the courts of this state for a cause of action arising from the doing of one of those acts.

Engineered Storage involved the failure of a defendant to make payments of money due in Florida. At least three other Florida cases expressly state that the failure of a non-resident to pay money due in Florida under a

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constitutional qualifier—then no jurisdictional statute could ever be declared unconstitutional, and no direct appeal would ever lie from any decision that the forum court lacked personal jurisdiction. That is clearly not the case, because jurisdictional statutes must be held to mean what they say.

12. *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114, 115 n.3 (Fla. 3rd DCA 1982).

contract—with no other contacts with Florida—is alone "sufficient" under §48.193(1)(g) to confer long-arm jurisdiction under the statute.[13] And four others enforce the statute under identical circumstances—implicitly affirming the statutory sufficiency of this single contact.[14] Thus, given the plain language of the statute, its consistent interpretation by the Florida courts, and the parties' agreement that the requisites for Florida long-arm jurisdiction were satisfied in this case, there can be no question that the only issue decided by the circuit court was whether or not the statute as applied was constitutional.

Of course 28 U.S.C. §1254(2) creates a right of direct appeal by any party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution.[15] This is true whether the statute is declared invalid on its face, or as applied.[16] And §1254(2) creates

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13. *Thompson v. King*, 523 F. Supp. 180, 184 (M.D. Fla. 1981) (Florida law); *Wilks v. Swift and Co.*, 382 So.2d 1364 (Fla. 1st DCA 1980); *Professional Patient Transportation, Inc. v. Fink*, 365 So.2d 209, 210 (Fla. 3rd DCA 1978).

14. *Chen v. Watter*, 421 So.2d 771, 772 (Fla. 4th DCA 1982) (per curiam); *Carroll Associates, Inc. v. Video Applications, Inc.*, 421 So.2d 3 (Fla. 5th DCA 1982) (per curiam); *Guritz v. American Motivate, Inc.*, 386 So.2d 60, 61-62 (Fla. 2nd DCA 1980); *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*, 342 So.2d 1082, 1084 (Fla. 2nd DCA 1977). *But see Scordilis v. Drobnicki*, 443 So.2d 411, 412-14 (Fla. 4th DCA 1984); *Osborn v. University Society, Inc.*, 378 So.2d 873, 874 (Fla. 2nd DCA 1979).

15. *See generally United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962) (per curiam); *City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 491-92 (1958).

16. *New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976) (per curiam); *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) (separate opinion announcing judgment). Also instructive on this point are cases decided under 28 U.S.C. §1252—creating a right of appeal from decisions invalidating federal statutes. *See United States v. Darusmont*, 449 U.S. 292, 293 (1981) (per curiam); *United States v. Clark*, 445 U.S. 23, 25 n.2 (1980); *McLucas v. De Champlain*, 421 U.S. 21, 30-31 (1975); *United States v. American Friends Service Committee*, 419 U.S. 7, 9 n.4 (1974); *Fleming*

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a right of appeal even if the circuit court's opinion does not expressly declare a state statute unconstitutional, so long as such a conclusion is inherent in the circuit court's holding. As this Court has stated regarding analogous appeals from decisions invalidating federal statutes under 28 U.S.C. §1252: "Finally, §1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional, so long as a determination that the statutory provision was unconstitutional 'was a necessary predicate to the relief' that the lower court granted."[17] In this case there can be no question that such a conclusion is inherent in the relief of dismissal granted by the circuit court.

In dissent, Judge Johnson disagreed strongly with that conclusion. In reliance upon *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921 (5th Cir. 1981) (per curiam), the dissent argued that it is not unfair to subject Mr. Rudzewicz to jurisdiction in Florida, because he deliberately availed himself of the benefits of the forum by signing a contract calling for the application of Florida law. Under such circumstances, Florida has an interest in exercising such jurisdiction, and Mr. Rudzewicz is no less inconvenienced by the necessity of litigating in Florida than is Burger King inconvenienced by the necessity of litigating in Michigan—and prospectively, in all 50 states. Finally, the dissenting opinion notes that Mr. Rudzewicz is senior partner of a Michigan ac-

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v. Rhodes, 331 U.S. 100, 102-03 (1947); *Cf. United States v. Raines*, 362 U.S. 17, 20 (1960) (dictum). *See also United States v. Knox*, 396 U.S. 77, 79 n.2 (1969) (decided under 18 U.S.C. §3731—dealing with decisions declaring criminal statutes invalid).

17. *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982), *citing United States v. Clark*, 445 U.S. 23, 26 n.2 (1980). *Compare United States v. Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 563-66 (1972) (per curiam).

counting firm, and that he personally negotiated these contracts obligating payments in excess of $1,000,000.00—which is inconsistent with any claim that he was victimized by boilerplate contractual language forced upon him: "He therefore had reasonable notice of the possibility that he would be sued under the contracts in the State of Florida, and he should have been adequately prepared for that contingency" (A20).

THE QUESTION IS SUBSTANTIAL

It would be impossible and inappropriate to undertake in this Jurisdictional Statement a comprehensive treatment of the issue and the cases addressing it. Instead, we hope to emphasize here the far-reaching impact of the circuit court's opinion; note the substantial inter-circuit and intra-circuit conflict which it reflects; and at least sketch the compelling substantive argument which we hope to advance.

By our count, there are at least 30 states whose rules or statutes currently permit the exercise of long-arm jurisdiction under circumstances analogous to those here.[18]

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18. *See* Rule 4.2(2)(B) and (I), Alabama R. Civ. P. (contracting to supply services or goods in Alabama; any other fair and reasonable minimum contact); ALASKA STAT. §09.05.015(5) (1983) (promises to deliver anything of value to Alaska; the shipment of goods from Alaska, or the receipt of goods in Alaska); Rule 4(e)(1), Arizona R. Civ. P. (any person causing an event to occur in Arizona out of which a claim arises); DEL. CODE ANN. tit.10, §3104 (1975) (contract to supply services or things in Delaware); IOWA CODE ANN. §617.3 (West Supp. 1982) (making a contract in Iowa to be performed in whole or part in Iowa); KANSAS STAT. ANN. §60-308(b)(5) (1983) (express or implied contract, by mail or otherwise, with a resident of Kansas, to be performed in whole or in part by either party in Kansas); KY. REV. STAT. §454.210(2)(a)(2) (Baldwin 1979) (contracting to supply services or goods in Kentucky); LA. REV. STAT. ANN. §13:3201(b) (West 1968) (contracting to supply services or things in Louisiana); ME. REV. STAT. ANN. tit.14, §704-A (1980) (contracting to supply services or things in Maine);

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In addition, almost every state has a "doing business" statute—and there are numerous state decisions holding that the contractual obligation to make payment in the forum

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MD. CTS. JUD. PROC. CODE ANN. §6-103(b) (1974) (contracting to supply goods or things in Maryland); MASS. GEN. LAWS ANN. ch.223A, §3(b) (West 1958; Supp. 1983) (contracting to supply services or things in Massachusetts); MICH. COMP. LAWS §600.705(5) (1975) (contracting for services or materials in Michigan); MISS. CODE 1972 tit.13, §13-3-57(1) (Supp. 1983) (contract to be performed in whole or part by either party in Mississippi); MO. REV. STAT. §506.500.1(2) (1967) (making of any contract within Missouri); Rule 4B(1)(e), Montana R. Civ. P. (contract for services or materials furnished in Montana); NEB. REV. STAT. §25-536(b) (1979) (contracting to supply services or things in Nebraska); N.Y. CIV. PRAC. LAW §302(a)(1) (McKinney 1982) (contracting to supply goods or services in New York); N.C. GEN. STAT. §1-75.4(5) (1983) (contract to deliver or receive things of value in North Carolina); Rule 4(b)(2)(B), North Dakota R. Civ. P. (contract to supply goods or other things in North Dakota); OHIO REV. CODE ANN. §2307.38.2(A)(2) (Page 1981) (contracting to supply services or goods in Ohio); OKLA. STAT. ANN. tit.12, §1701.3 (West 1980) (contract to supply services or things in Oklahoma); Rule 4E.(1), Oregon R. Civ. P. (promise to make payment for services performed in Oregon); PA. CONS. STAT. ANN. tit.42, §5322 (Purdon 1981; Supp. 1983) (contracting to supply services or things; causing harm by act or omission outside Pennsylvania); S.C. CODE ANN. §36-2-803 (1)(g) (Law. Co-op. 1977) (contract to be performed in whole or in part in South Carolina); S.D. CODIFIED LAWS ANN. §47-8-17 (1983) (contract to be performed in whole or in part by either party in South Dakota); TENN. CODE ANN. §20-2-214(5) (1980) (contract for services or materials); TEX. REV. CIV. STAT. ANN. art.2031b(4) (Vernon 1964) (doing business, defined as entering into a contract by mail or otherwise, to be performed in whole or in part by either party in Texas); UTAH CODE ANN. §28-27-24(2) (1977) (contracting to supply services or goods); VA. CODE §8.01-328.1(2) (Supp. 1983) (contracting to supply services or things); W.VA. CODE §56-3-33(a)(2) (Supp. 1983) (contracting to supply services or things); WIS. STAT. ANN. §801.05 (West 1977) (promise to deliver things of value in Wisconsin).

We recognize that many of these statutes confer jurisdiction on parties obligated to ship goods or things into the forum jurisdiction—but not, as here, to pay money or otherwise perform a contract. We cite these statutes because it seems to us that the circuit court's reasoning in this case would invalidate them as well. After all, Mr. Rudzewicz was not simply a passive con-

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state is a form of doing business under such statutes.[19] And as we will note below, a clear majority of federal decisions uphold such applications of "doing business" statutes as consistent with constitutional requirements.

Thus, the circuit court's decision in this case affects far more than just a single Florida statute. It implicates at least 10 states—and as many as 31—with comparable statutes. It implicates the "doing business" legislation of almost every state. It does so on a subject about which this Court has not definitively spoken. And it does so in the context of a national trend toward the franchising of retail service establishments. This case may determine whether every franchisor must litigate not under a coherent set of state laws enforced in a single jurisdiction—but wherever a disputatious franchisee may reside.

It would serve no useful purpose to canvass here the seminal decisions of this Court on the issue of personal ju-

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sumer whose business was solicited in this case; he was the active party in an arms-length commercial transaction. That was not enough for the circuit court in this case, and thus its reasoning might well invalidate statutes conferring jurisdiction over parties obligated to send goods or services, rather than money, into the forum state. In any event, even apart from these statutes, we have cited nine other statutes which are precisely analogous to the Florida statute overturned in this case.

19. *See, e.g., Mouzavires v. Baxter*, 434 A.2d 988 (D.C. App. 1981), *cert. denied*, 455 U.S. 1006 (1982); *First Wyoming Bank v. Trans. Mt. Sales & Leasing, Inc.*, 602 P.2d 1219 (Wyo. 1979); *Bard Bldg. Supply Co., Inc. v. United Foam Corp.*, 137 Vt. 125, 400 A.2d 1023 (1979); *International Merchandising Associates, Inc. v. Lighting Systems, Inc.*, 20 Ill. Dec. 838, 64 Ill. App.3d 346, 380 N.E.2d 1047 (1978); *Manufacturers' Lease Plans, Inc. v. Alverson Draughon College*, 115 Ariz. 358, 565 P.2d 864 (1977); *Mitchim v. Mitchim*, 518 S.W.2d 362 (Tex. Supp. 1975); *A. F. Briggs Co. v. Starrett Corp.*, 329 A.2d 177 (Me. 1974); *Proctor & Schwartz, Inc. v. Cleveland Lumber Co.*, 228 Pa. Super. 12, 19-20, 323 A.2d 11, 15 (1974); *Cook Associates, Inc. v. Colonial Broach & Machine Corp.*, 14 Ill. App.3d 965, 970, 304 N.E.2d 27, 31 (1973); *Uvalde Rock Asphalt Co. v. Consolidated Carpet Corp.*, 457 S.W.2d 649 (Tex. Civ. App. Beaumount 1970).

risdiction.[20] These cases establish the parameters for our inquiry, but they provide few answers "in black and white. The greys are dominant and even among them the shades are innumerable."[21] Each case must rest on its own facts, revealing the presence or absence of sufficient "affiliating circumstances" to confer jurisdiction.[22] We merely note here that the question is whether Mr. Rudzewicz had sufficient minimum contacts with Florida such that the maintenance of this suit would not offend traditional notions of fair play and substantial justice.[23] The answer depends on whether the "quality and nature" of Mr. Rudzewicz' activity were such that it was "reasonable" and "fair" to require him to defend this action in Florida.[24]

As we see it, the circuit court struck the balance against the exercise of jurisdiction primarily because Mr. Rudzewicz both contracted and partially performed his contract with Burger King by telephone and by mail—but never set foot on Florida soil. Although his co-franchisee did attend training courses in Florida, at most Mr. Rudzewicz promised that he *would* travel to Florida under this agreement, if arbitration were necessary (X. 9 at 21 or R. 53).

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20. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kaulko v. Superior Court of California*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

21. *Estin v. Estin*, 334 U.S. 541, 545 (1948), cited in *Kaulko v. California Superior Court*, 436 U.S. 84, 92 (1978).

22. *Hanson v. Denckla*, 357 U.S. 235, 2[illegible] (1958).

23. *See Kaulko v. California Superior Court, supra*, 436 U.S. at 98; *International Shoe Co. v. Washington, supra*, 326 U.S. at 316, citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

24. *Kaulko v. California Superior Court, supra*, 436 U.S. at 92, citing *International Shoe Co. v. Washington, supra*, 326 U.S. at 316-17; *Shaffer v. Heitner, supra*, 433 U.S. at 207-12; *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445 (1952).

And yet as early as 1949, though in a different context, this Court held that the Constitution may permit the exercise of long-arm jurisdiction despite the absence of any physical contact with the forum.[25] Thus for example in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), this Court permitted California's exercise of long-arm jurisdiction over a Texas insurer which had assumed a risk centered in California. And in a variety of contexts analogous to this case, the circuit courts have emphasized that in proper cases, the forum may exercise jurisdiction over a non-resident defendant who has never been physically present in that forum.[26]

The real question is not whether Mr. Rudzewicz visited Florida, but whether the totality of his relationship with Burger King made it fair and reasonable to impose upon him the requirement of making his first trip to Florida to defend this action. That question will occupy any subsequent brief on the merits. Our object here is to provide a thumbnail sketch of the argument, demonstrating the substantial authority for our position.

First, a significant number of cases support the exercise of jurisdiction under state statutes analogous to this

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25. *Travelers Health Association v. Commonwealth of Virginia at the Relation of the State Corporation Commission*, 339 U.S. 643 (1949).

26. *See, e.g., Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 937 (10th Cir. 1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 495-98 (5th Cir. 1974); *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1175 (7th Cir. 1971); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 (8th Cir. 1969); *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 382 (6th Cir. 1968). If that were not the case, then Burger King might avoid this entire problem by simply requiring all prospective franchisees to come to Florida to negotiate and close on their contracts—to pay for transportation and lodging and legal counsel as the cost of their accession to the laws of Florida.

one.[27] *In Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003 (5th Cir. 1982), for example, the representative of a Mississippi trucking firm had contacted a California freight broker while in California, and there made an oral agreement to supply trucks to move goods for the California company on an open account basis. The orders were telephoned to Mississippi, with payments due to Mississippi, but none of the trucks shipped to California originated in Mississippi, although some passed through the state on their way. The Mississippi statute confers jurisdiction over anyone making a contract with a Mississippi resident to be performed in whole or part by any party in Mississippi. Though the California company had no physical contact with Mississippi, the court upheld the exercise of its long-arm jurisdiction on the basis of the telephone calls and payments made to Mississippi. We commend to the Court the compelling language of this opinion, which we lack the space to quote.

We also lack the space to summarize the facts of the other cases cited in footnote 27. We especially note the tenth circuit's opinion in *Continental American* and the fifth circuit's opinion in *Marathon Metallic*—both cases strikingly analogous to this one—both opinions compelling.

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27. *See, e.g., Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062 (4th Cir. 1982); *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309 (10th Cir. 1982); *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003 (5th Cir. 1982); *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921 (5th Cir. 1981) (per curiam); *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933 (10th Cir. 1977); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th Cir. 1969); *Thompson v. King*, 523 F. Supp. 180 (M.D. Fla. 1981) (upholding this particular statute); *Federal National Bank & Trust Co. of Shawnee v. Moon*, 412 F. Supp. 644 (W.D. Okla. 1976); *First National Bank of Kansas City v. Ward*, 380 F. Supp. 782 (W.D. Mo. 1974); *Standard Leasing Co. v. Performance Systems, Inc.*, 321 F. Supp. 977, 979 (N.D. Tex. 1971).

Second, we invoke a substantial number of cases in which "doing business" statutes were applied under facts analogous to those here.[28] For example, in *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974), a Texas company (Product Promotions) contracted by mail with a French corporation (CEMA) for the testing of Product Promotions' product in France and Monaco. The contract was made in Texas because it was signed last by Product Promotions in Texas; and the test results were shipped by CEMA to Texas in two mailings. Those were the only two contacts between CEMA and Texas, but the court held them sufficient to subject CEMA to Texas long-arm jurisdiction.

We commend to the Court the discussion at pages 495-98. With almost no modification, that language can be applied to this case. No less in this case, the contract with Mr. Rudzewicz was governed by the law of the forum, not only because it said so, because it was signed last by Burger King in Florida. No less in this case, payment by Mr. Rudzewicz to Florida was an "essential portion"

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28. *See, e.g., Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980) (per curiam); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *Ajax Realty Corp. v. J. F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971); *Erie Press Systems, A Division of EFCO, Inc. v. Shultz Steel Co.*, 548 F. Supp. 1215, 1218-21 (W.D. Pa. 1982); *Vena v. Western General Agency, Inc.*, 543 F. Supp. 779, 784 (N.D. Ill. 1982); *Snyder v. Hampton Industries, Inc.*, 521 F. Supp. 130, 146-57 (D. Md. 1981); *Commercial Discount Corp. v. King*, 515 F. Supp. 988, 992 (N.D. Ill. 1981); *Jadair, Inc. v. Van Lott, Inc.*, 512 F. Supp. 1141 (E.D. Wisc. 1981); *Cross v. Del Webb's Hotels, Inc.*, 482 F. Supp. 664 (E.D. Tex. 1979); *Standard Life & Accident Ins. Co. v. Western Finance*, 436 F. Supp. 843 (W.D. Okla. 1977); *Third National Bank in Nashville v. Hardi-Gardens Supply of Illinois*, 380 F. Supp. 930, 936-37 (M.D. Tenn. 1974). *Cf. Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972).

of his performance under the contract. No less in this case, Mr. Rudzewicz' breach of the contract had "reasonably foreseeable consequences within the State." No less in this case, his "contacts with the forum were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws were reasonably foreseeable, if not foreseen, rather than a surprise." No less in this case, the "cause of action for breach of contract arose out of a transaction between the parties that was consummated [in Florida]." No less in this case, Mr. Rudzewicz "entered a contract that required some performance in [Florida]; that [he] did not contemplate breaching [his] own contractual obligations does not make it unreasonable to foresee that those obligations might be tested in [Florida]." No less in this case, since the contract was made in Florida, Mr. Rudzewicz had "reason to foresee that enforcement and protection of [his] own rights under the contract might depend on the laws of [Florida]." No less in this case did Mr. Rudzewicz voluntarily enter "a transaction with one [he] knew to be a [Florida] resident, a transaction which had a substantial connection with [Florida] and which [he] knew could have consequences in [Florida]." No less in this case does Florida have a "legitimate and reasonable interest in providing a forum for this suit," because the "plaintiff is a [Florida] resident, the contract was made in [Florida], and [Florida] law will surely be of some relevance in resolving the suit." It would be virtually impossible to reconcile this decision with the circuit court's decision in this case. We invoke as well the decisions in *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971), and *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980) (per curiam), as well as the other cases cited in footnote 28.

On the basis of these authorities, it is possible to derive a list of Mr. Rudzewicz' contacts with Florida which demonstrates the propriety of the trial court's exercise of jurisdiction. It would be inappropriate here to undertake a comprehensive treatment of each factor in all of its nuances, but we can at least provide a sketch of the balance we hope to strike if permitted to brief the case on the merits.

1. The choice of the Florida forum was not fortuitous, given Burger King's substantial contacts with Florida—its headquarters, its record-keeping, its principal offices. This Court has held that the unilateral activity of the plaintiff in the forum state is not alone sufficient to confer jurisdiction,[29] but more-recently has said this: "The plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction . . . but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises."[30] Because of Burger King's location in Florida, it was neither fortuitous nor unexpected that Mr. Rudzewicz' breach of his contract would result in a lawsuit in Florida.

2. Because the contracts in question require the application of Florida law, Mr. Rudzewicz purposefully invoked the benefits of Florida law, and it was neither fortuitous nor unexpected that he was asked to answer in a Florida court. Even without the contractual provi-

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29. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

30. *Calder v. Jones*, ____ U.S. ____, ____ S. Ct. ____ (1984) (52 LW 4349, 4351), *citing McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). *See Keeton v. Hustler Magazine, Inc.*, ____ U.S. ____, ____ S. Ct. ____ (1984) (52 LW 4346, 4348) ("Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum").

sions, Florida law would apply in this case.[31] But if the contract were silent on this point, it might be argued that Mr. Rudzewicz did not in signing it purposefully avail himself of the benefits of Florida law, or have reasonable notice of Florida's interest in the adjudication of its law. As this Court noted in *Kaulko v. Superior Court of California in and for the City and County of San Francisco*, 436 U.S. 84, 98 (1978), the fact that one state may be the center of gravity "for choice-of-law purposes does not mean that [that state] has personal jurisdiction over the defendant." But here, Mr. Rudzewicz specifically invoked the benefits of the forum by contracting for the application of Florida law, and thus had reason to anticipate that he might be called to answer for his conduct in a Florida court.[32]

3. Because Mr. Rudzewicz was obligated to make payment in Florida, he should reasonably have anticipated

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31. This contract was made in Florida because it was signed last by Burger King in Florida. *See Colhoun v. Greyhound Lines, Inc.*, 265 So.2d 18 (Fla. 1972). In Florida, "[t]he validity and obligation of a contract is determined by the lex loci contractus." *Holderness v. Hamilton Fire Ins. Co.*, 54 F. Supp. 145, 148 (S.D. Fla. 1944), *citing Aetna Life Ins. Co. v. Dunben*, 266 U.S. 389 (1924). *See Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873, 878-79 (5th Cir. 1978) (Florida law). Moreover, Florida law provides that where a place of payment is unspecified, the debtor must seek the creditor. *Williams v. Aeroland Oil Co.*, 155 Fla. 114, 20 So.2d 346 (1944); *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114, 115 (Fla. 3rd DCA 1982) (and cases cited). If the debtor fails to make payment, the cause of action accrues where the creditor resides. *Saf-T-Clean, Inc. v. Martin-Marietta Corp.*, 197 So.2d 8 (Fla. 1967); *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*, 342 So.2d 1082, 1084 (Fla. 2nd DCA 1977).

32. *See United States Railway Equipment Co. v. Port Huron and Detroit R. Co.*, 495 F.2d 1127, 1130 (7th Cir. 1974); *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971); *Jadair, Inc. v. Van Lott, Inc.*, 512 F. Supp. 1141, 1145 (E.D. Wisc. 1981); *Rosen v. Solomon*, 374 F. Supp. 915, 920 (E.D. Pa. 1974), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975); 1 MOORE'S FEDERAL PRACTICE ¶0.145[5], at 1628-29 (2nd ed. 1980).

that his default would cause economic injury in Florida. This Court has suggested that the place of a contract may be less important for jurisdictional purposes than is the "great weight" accorded to the "consequences" of a contractual obligation.[33] Thus, in its recent decision in *Calder v. Jones*, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4349, 4351), this Court found that California's long-arm jurisdiction over a Florida publisher was appropriate not only because its magazine reached California, but also because "the brunt of the harm" was suffered there. Likewise here, Florida is the "focal point . . . of the harm suffered" by Burger King in this case.[34]

For the three reasons listed above, we think there can be no question that Mr. Rudzewicz should have "reasonably anticipate[d] being haled into court" to answer under Florida law for the injuries foreseeably caused in Florida by his breach of a contract made in Florida.[35] There was nothing fortuitous about this action.

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33. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943), *cited in Travelers Health Association v. Commonwealth of Virginia at the Relation of the State Corporation Commission*, 339 U.S. 643, 648 (1949). *See Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 n.10 (8th Cir. 1969). *Cf. Kaulko v. Superior Court of California in and for the City and County of San Francisco*, 436 U.S. 84, 96 (1978) (*dictum*).

34. *Id. See O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 (8th Cir. 1969); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 227 (6th Cir. 1972); *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 375, 380, 382 (6th Cir. 1968).

35. *Keeton v. Hustler Magazine*, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4346, 4348), *citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). *Accord, Calder v. Jones*, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4349, 4351); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977); *Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062, 1069 (4th Cir. 1982); *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309, 1314 (10th Cir. 1982). *Compare Kaulko v. Superior Court of California in and for the City and County of San Francsico, supra*, 436 U.S. at 97-98.

4. The action in Florida grew out of Mr. Rudzewicz' contacts with the forum; the "connexity" requirement is satisfied. In its recent decision in *Helicopteros Nationales De Colombia, S.A. v. Hall*, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4491), this Court suggested that if a cause of action does not arise out of the defendant's activities in the forum state, that state may exercise general jurisdiction over the defendant only if its contacts constitute a "continuous and systematic general business" presence. If a defendant's presence is not so systematic as to create a general jurisdiction, the "connexity" requirement—the requirement that the cause of action arise out of the defendant's contacts with the forum—is a constitutional prerequisite for the exercise of specific jurisdiction. In this case, the cause of action does arise out of Mr. Rudzewicz' contacts with the forum, supporting the exercise of specific jurisdiction—and thus it is not unfair to subject Mr. Rudzewicz to jurisdiction in Florida on the basis of contacts which are less than "continuous and systematic."[36]

5. Mr. Rudzewicz was not a passive participant in this relationship; he was an educated, intelligent, active, equal partner in an arms-length transaction. As this Court held in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), the key question is whether the defendant purposely availed himself of the privilege of doing business with the forum state. When the defendant is a passive consumer—who merely responds to an offer made, for example, in a mail-order catalog—that kind of purposeful solicitation is not present, and it would be unfair to require the buyer to de-

36. *See Vishay Intertechnology, Inc. v. Delta International Corp., supra*, 696 F.2d at 1069; *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 228-29 (6th Cir. 1972); *First National Bank of Kansas City v. Ward*, 380 F. Supp. 782, 785 (W.D. Mo. 1974).

fend in a foreign jurisdiction.[37] That observation has led some courts to draw a general distinction between actions against buyers and actions against sellers—on the assumption that the buyer is always passive, and the seller is always actively trading his amenability to suit in the forum for his right to compete for sales.[38]

Of course it might be argued that even the decision of a buyer to purchase is an affirmative, active decision to invoke the benefits of the forum.[39] But at the very least, it can be said that in *some* cases buyers—especially non-consumer buyers—are not merely passive. The question is not whether the defendant is the buyer or seller, but whether or not the defendant engaged in some purposeful activity to invoke the benefits of the forum.[40] Thus in proper cases, an "active" buyer will be subject to litigation in a foreign jurisdiction.[41]

37. *Nordberg Division of Rex Chainbelt, Inc. v. Hudson Engineering Corp.*, 361 F. Supp. 903, 906 (E.D. Wisc. 1973), *citing Geneva Industries, Inc. v. Copeland Construction Corp.*, 312 F. Supp. 186 (N.D. Ill. 1970). *See United States Railway Equipment Co. v. Port Huron and Detroit R. Co.*, 495 F.2d 1127, 1130 (7th Cir. 1974); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 221, 227 n.13, 232 (6th Cir. 1972). And if it is not a violation of due process, it may well be an unfair trade practice under the Federal Trade Commission Act. *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976).

38. *See Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 368 (8th Cir. 1969), *citing Marshall Egg Transport Co. v. Bender Goodman Co.*, 275 Minn. 534, 148 N.W.2d 161 (1967).

39. "The defendant's alleged promise to pay plaintiff $40,000 at Wildwood, Florida constituted an affirmative decision by defendant to create a substantial contact with the State of Florida." *Thompson v. King*, 523 F. Supp. 180, 185 (M.D. Fla. 1981).

40. *See Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 151 (5th Cir. 1980); *Vena v. Western General Agency, Inc.*, 543 F. Supp. 779, 784 (N.D. Ill. 1982).

41. *See, e.g., Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1008-09 (5th Cir. 1982); *In-Flight Devices Corp. v. Van Dusen Air, Inc., supra*, 466 F.2d at 232 (distinguishing the "mail order" cases); *United States Railway Equipment Co. v. Port Huron and Detroit R. Co.*, 495 F.2d 1127, 1130 (7th Cir. 1974) (distinguishing the "mail order" cases).

In this case, it is undisputed that Mr. Rudzewicz initiated this contract, by making application for approval as a franchisee. And even if Burger King had made the first contact, Mr. Rudzewicz was an active participant in the negotiations.[42] For example, before the franchise and lease agreements were signed by Burger King, he succeeded in negotiating a substantial reduction in his rent after the third year (X. 9 at 3 or R. 35; *see* A17 n.12, Tr. 222, 500). And it should be remembered that the franchisees did make several payments to Burger King in Miami before defaulting. That has been held to constitute a form of affirmative conduct invoking the benefits of the forum.[43]

6. Florida has a clear interest in assuring the proper application of its own law. These contracts call for the application of Florida law. That helps tip the balance toward the exercise of jurisdiction in Florida.[44]

7. Florida has an interest in protecting its citizens from injury suffered in Florida, and that supports the exercise of jurisdiction.[45] It has been held that the interest

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42. "While the plaintiff initiated negotiations with the defendant, the defendant actively and voluntarily participated in them thereafter." *Electro-Craft Corp. v. Maxwell Electronics Corp., supra*, 417 F.2d at 369, *citing Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968), *and Shealy v. Challenger Mfg. Co.*, 304 F.2d 102, 104 (4th Cir. 1962). *See Erie Press Systems, a Division of EFCO, Inc. v. Shultz Steel Co.*, 548 F. Supp. 1215, 1221 (W.D. Pa. 1982).

43. *See Continental American Corp. v. Camera Controls Corp*, 692 F.2d 1309, 1314 (10th Cir. 1982); *Standard Leasing Co. v. Performance Systems, Inc.*, 321 F. Supp. 977, 979 (N.D. Tex. 1971).

44. *See Southwest Offset, Inc. v. Hudco Publishing Co., supra*, 622 F.2d at 152; *Lieb v. American Pacific International, Inc.*, 489 F. Supp. 690, 697 (E.D. P... 1980); *Rosen v. Solomon*, 374 F. Supp. 915, 920 (E.D. Pa. 1974), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975). *Cf. Leroy v. Great Western United Corp.*, 443 U.S. 173, 186 (1979); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

45. *See Keeton v. Hustler Magazine, Inc.* ___ U.S. ___, ___ S. Ct. ..... (1984) (52 LW 4346, 4347); *Vishay Intertechnology,*

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of the forum in the outcome of particular litigation is a powerful argument for jurisdiction in that forum.[46]

8. Finally, it should be noted that Mr. Rudzewicz was no less inconvenienced by the necessity of litigating in Florida than would Burger King be inconvenienced by the necessity of litigating in Michigan—and prospectively, in all 50 states. At best, this consideration is a standoff.[47]

If permitted to brief this case on the merits, we hope to make these and other points in greater depth. At the least, we hope to have suggested already the substantial authority supporting our position—and the significant number of analogous state statutes and federal decisions implicated by the circuit court's decision in this case. We do

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Footnote continued—

Inc. v. Delta International Corp., 696 F.2d 1062, 1069 (4th Cir. 1982); *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309, 1313-14 (10th Cir. 1982); *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 644 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 937 (10th Cir. 1977); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 221, 223 (6th Cir. 1972); *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 385 (6th Cir. 1968).

46. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878), *cited in Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 956 (1960). *See* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1129 (1966). *Cf. McGee v. International Life Ins. Co.*, 335 U.S. 220, 223 (1959); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-14 (1949).

47. *See Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1011 n.6 (5th Cir. 1982); *Standard Fittings Co. v. Sapag, S.A., supra*, 625 F.2d at 644; *Southwest Offset, Inc. v. Hudco Publishing Co., supra*, 622 F.2d at 152; *Pedi Bares, Inc. v. P & C Food Markets, Inc., supra*, 567 F.2d at 937; *Electro-Craft Corp. v. Maxwell Electronics Corp., supra*, 417 F.2d at 370; *Product Promotions, Inc. v. Cousteau, supra*, 495 F.2d at 498; *Jadair, Inc. v. Van Lott, Inc.*, 512 F. Supp. 1141, 1145 (E.D. Wisc. 1981); *Lieb v. American Pacific International, Inc.*, 489 F. Supp. 690, 697 (E.D. Pa. 1980); *Rosen v. Solomon*, 374 F. Supp. 915, 920 (E.D. Pa. 1974), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975). *Cf. McGee v. International Life Ins. Co., supra*, 335 U.S. at 223.

not contend that this authority is unanimous; there are decisions consistent with the circuit court's decision in this case.[48] But these cases only emphasize the unsettled nature of this question in the absence of a definitive ruling by this Court. Because the question is so far-reaching—because it potentially implicates the long-arm jurisdiction exercised by every state—we respectfully submit that a significant federal question is presented by this case.[49]

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48. *See, e.g., Hydrokinetics, Inc. v. Alaska Mechanical Inc.*, 700 F.2d 1026 (5th Cir. 1983); *U.S. appeal pending; Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982); *Telco Leasing, Inc. v. Marshall County Hospital*, 586 F.2d 49 (7th Cir. 1978); *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974).

49. As a final point, especially in a brief concerned with fundamental fairness, we feel it appropriate to comment on the circuit court's determination to decide this case solely on the basis of Mr. Rudzewicz' contacts with the forum relative to the contract claims invoked under §48.193(1)(g). As we have noted, Burger King also claimed trademark infringement, and that is a species of tort. *See Norman M. Morris Corp. v. Weinstein*, 466 F.2d 137 (5th Cir. 1972); *Federal-Mogul-Bower Bearings, Inc. v. Azoff*, 313 F.2d 405 (6th Cir. 1963); *Altech Industries, Inc. v. Al Tech Specialty Steel Corporation*, 528 F. Supp. 521 (D. Del. 1981). Moreover, as we have noted, 15 U.S.C. §1116 permits injunctive relief to enforce trademark claims, which relief Burger King sought and received in this case, and provides for nationwide service of process in aid of such injunctive relief. Under such circumstances, the only jurisdictional question before the district court regarding these claims, under the first part of the first sentence of Rule 4(e), Fed. R. Civ. P., was whether Mr. Rudzewicz had sufficient contacts with the *United States* to support the exercise of personal jurisdiction over him in the United States. *See Burstein v. State Bar of California*, 693 F.2d 511, 515-16 (5th Cir. 1982), *citing Federal Trade Commission v. Jim Walter Corp.*, 651 F.2d 251, 254-56 (5th Cir. 1981), *and Black v. Acme Markets, Inc.*, 564 F.2d 681 (5th Cir. 1977). Of course, there would remain issues of venue and service of process. *Burstein v. State Bar of California, supra*, 693 F.2d at 515-16 n.8, but those issues were not raised by Mr. Rudzewicz before the circuit court, and have been waived. On the *jurisdictional* question, acknowledgement of Burger King's infringement claims should have ended the inquiry, forestalling the circuit court's remand with instructions to dismiss.

Moreover, even if the federal statute were silent concerning the "circumstances" under which service might be made (Rule 4(e), first sentence), we would then focus on the second sen-

(Continued on following page)

CONCLUSION

For the reasons provided above, it is respectfully submitted that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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June 20, 1984

Footnote continued—

tence of Rule 4(e)—adopting the service rules of the state in which the district court is held—and that leads us to the Florida statute governing tortious acts committed in Florida, §48.193(1)(b). *See Burstein v. State Bar of California, supra*, 693 F.2d at 514-17, *cited in DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1266-68 (5th Cir. 1983). *But see Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 585 (5th Cir. 1982) (federal long-arm standard always applies). If permitted to brief this case, we will demonstrate that by overwhelming authority in Florida, §48.193(1)(b) clearly applies to Mr. Rudzewicz' alleged tortious conduct in this case, because it foreseeably caused damage in Florida, and that damage was an element of the tort. And we will also demonstrate the constitutionality of the application of this statute in that context. *See Bangor Punta Operations, Inc. v. Universal Marine Co., Ltd.*, 543 F.2d 1107 (5th Cir. 1976) (upholding §48.193(1)(b) in trademark case); *Rebozo v. Washington Post Co.*, 515 F.2d 1208 (5th Cir. 1975) (upholding §48.193(1)(b) in libel case). *See also Simon v. United States*, 644 F.2d 490 (5th Cir. 1981); *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974).

Thus, had the circuit court acknowledged Burger King's trademark claims in this case—whether reviewing the question of personal jurisdiction relative to those claims under federal law or under state law—it could not have remanded this case with instructions to dismiss. It was fundamentally unfair for the circuit court to entertain Mr. Rudzewicz' constitutional challenge to the exercise of jurisdiction over Burger King's contract claims, without any acknowledgement of the independent basis for jurisdiction relative to its claims of trademark infringement.

APPENDIX

BURGER KING CORPORATION, a Florida Corporation,
Plaintiff-Appellee,

v.

Brian MACSHARA, Defendant,
John Rudzewicz, Defendant-Appellant.

No. 82-5424.

United States Court of Appeals,
Eleventh Circuit.

Feb. 13, 1984.

Franchisee appealed from judgment of the United States District Court for the Southern District of Florida, James W. Kehoe, J., awarding franchisor damages of $228,875.40 as well as costs of $2,151.06 and attorney fees of $30,000, in franchisor's breach of contract and trademark infringement action. The Court of Appeals, Vance, Circuit Judge, held that even though franchisee's activities fell within reach of Florida's long-arm statute, invocation of statute offended fundamental fairness which was touchstone of due process.

Reversed and remanded.

Johnson, Circuit Judge, filed dissenting opinion.

1. Constitutional Law (Key) 305(4)
Federal Courts (Key) 373

In diversity case, federal district court must exercise its jurisdiction in accordance with due process and law of state in which court sits. U.S.C.A. Const.Amend. 5.

2. Courts (Key) 12(2)

No defendant can be compelled to answer in state's courts unless minimum contacts exist between defendant, forum state and litigation such that maintenance of suit does not offend traditional notion of fair play and substantial justice.

3. Constitutional Law (Key) 305(5)

In deference to sovereignty of forum's sister states, due process requires that there be some act by which defendant purposely avails itself of privilege of conducting activities within forum state, thus invoking benefits and protections of its laws. U.S.C.A. Const.Amends. 5, 14.

4. Constitutional Law (Key) 305(4)

Due process restrictions on jurisdiction of courts are more than guaranty of immunity from inconvenient or distant litigation; they are consequence of territorial limitations on power of respective states. U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law (Key) 305(5)

State cannot justifiably assert jurisdiction over individual with whom it has no constitutionally cognizable contacts or ties.

6. Constitutional Law (Key) 305(5)

Although franchisee's activities fell within reach of Florida long-arm statute, invocation of statute offended fundamental fairness which is touchstone of due process, where only face-to-face contacts franchisee had with franchisor throughout months of protracted negotiations were with representatives of franchisor's Michigan office, franchisee maintained no staff in state of Florida, contracts contemplated start of Michigan restaurant whose profits would derive solely from food sales made to customers in Michigan, local Michigan office was responsible for providing all the services due franchisee, and franchisee was financially unprepared to meet costs of suit in Florida. West's F.S.A. § 48.193(1)(g); U.S.C.A. Const.Amends. 5, 14.

Thomas H. Oehmke, Oehmke & Richardson, Detroit, Mich., for defendant-appellant.

Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, Joel S. Perwin, Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

VANCE, Circuit Judge:

In 1979, with the economy poised on the brink of recession, John Rudzewicz and Brian MacShara decided to purchase a Burger King restaurant franchise near Detroit, Michigan. This appeal, filed by Rudzewicz,[1] is the unforeseen outcome of their ill-timed venture.

Rudzewicz, a senior partner in a Michigan accounting firm, agreed to secure investment capital while MacShara was to handle day-to-day operations. MacShara's experience included stints as a supervisor in his father's Michigan construction firm and as a onetime assistant at a Burger King restaurant. Both were and are residents and citizens of the state of Michigan.

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

1. MacShara has not appealed his judgment.

The Burger King Corporation is incorporated in Florida and headquartered in Miami. The company maintains a district office in Birmingham, Michigan. During the course of negotiations, which lasted five months, the Michigan district office was Burger King's sole representative in dealings with Rudzewicz and MacShara. H.G. Hoffman, the Michigan district manager, evaluated their proposal and wrote them on the company's behalf to convey approval of their franchise application. Following lengthy discussions, Hoffman persuaded them to acquire an existing store in Drayton Plains, Michigan to avoid the higher rent that would be entailed if they insisted upon construction of a new building. He also convinced them to purchase and install $165,000 worth of equipment before the final rental charge had been computed.

At the conclusion of each round of Michigan negotiations, the Miami office mailed Rudzewicz printed documents for his signature. The documents, once signed, were returned to Burger King headquarters in Miami for completion.[2] Following corporate approval, headquarters then mailed Rudzewicz copies of the completed documents for his files.

After granting initial approval, Burger King decided to schedule the grand opening for May 31, 1979, the close of its fiscal year, to ensure that the sale appeared in the company's year-end statement. On May 29, the day the final agreements arrived for signature, Rudzewicz and MacShara finally learned what rent Burger King expected them to pay. The figure was far in excess of the amount Rudzewicz had projected.[3] He telephoned Hoffman and demanded a lower figure. According to Rudzewicz, Hoffman replied that the rent computation was out of his hands. If Rudzewicz was unwilling to accept the figure Burger King proposed, Hoffman continued, he was always free to decline the franchise, rip out the fixtures he had installed at his own expense, and resell them at a loss. On June 4 Rudzewicz and MacShara signed the lease and franchise agreements in their individual capacities at a Michigan closing ceremony attended by employees of the local district office.

2. The record does not identify who mailed the papers to Miami.

3. *See infra* note 4.

In the lease agreement, Burger King agreed to lease the Drayton Plains store for a term of twenty years. Rent was set at a monthly minimum of $4,166.66 in the first two years and $5,286.58 thereafter or 8½% of monthly gross sales, whichever was greater.[4] The franchisees were required to remit rent, as well as royalties, tax refunds and other designated fees to Burger King headquarters in Miami.[5]

In return Burger King promised use of the Burger King mark, architectural advice, advertising services, financial counseling, and operations consultation. At trial, an executive from the Miami headquarters office testified that the Michigan district office was administratively re-

4. The lease called for minimum annual rent consisting of 13.4% of "construction costs." At trial, Rudzewicz testified that Michigan Burger King officials estimated construction costs would equal approximately $180,000. This figure was based on the costs of renovating the existing Drayton Plains facility.

Rent calculated on a base of $180,000 would equal $2,010 a month. Rudzewicz boosted his projection to $2,500 to amortize the additional cost of original construction. Although he testified that Hoffman promised that the rent at Drayton Plains would be lower than that at a new facility, the rent that Burger King finally proposed was computed on a base equal to that estimated for newly constructed facilities. This testimony stands undisputed and uncontradicted.

5. Rudzewicz and MacShara signed equipment contracts containing similar provisions with the Davmore division of Burger King.

sponsible for all of the supervision, advertising and consultation due under the contract. With the exception of a Burger King University management course which MacShara attended in Florida and the Miami payment obligation, the contracts provided for no contact of any kind between the Florida headquarters and the franchisees.

Within weeks of opening, the store had fallen behind in payments. Rescheduling negotiations broke down, and Burger King sued Rudzewicz and MacShara in diversity in the Southern District of Florida for breach of contract and trademark infringement. Defendants entered a special appearance to contest personal jurisdiction. After losing this motion, they filed a counterclaim seeking damages under the Michigan Franchise Investment Act.[6] A bench trial ensued and Judge Kehoe entered judgment for Burger King on both the contract claim and the counterclaim. Damages of $228,875.40 were assessed against defendants in their individual capacities. In addition, Burger King was awarded costs of $2,151.06 and $30,000 in attorneys fees.

On appeal, Rudzewicz contests his judgment for lack of personal jurisdiction as well as on substantive grounds. He further appeals the ruling on the counterclaim. Because we conclude that the trial court lacked personal jurisdiction over Rudzewicz, we do not reach the merits.

I.

[1] In a diversity case, a federal district court must exercise its jurisdiction in accordance with due process and the law of the state in which the court sits. *Bankhead Enterprises, Inc. v. Norfolk & Western Ry.*, 642 F.2d 802, 804 (5th Cir. Unit B 1981). Although Rudzewicz concedes

6. Mich.Comp.Laws Ann. § 445.1501 *et seq.*

that his activities fall within the reach of the Florida long-arm statute, Fla.Stat. § 48.193(1)(g),[7] he argues that invocation of that statute under these circumstances exceeds the bounds of due process.

[2, 3] No defendant can be compelled to answer in a state's courts unless minimum contacts exist among defendant, the forum state and the litigation such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 203, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977); *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). In deference to the sovereignty of the forum's sister states, due process requires "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94, 297, 100 S.Ct. 559, 565-66, 567, 62 L.Ed.2d 490 (1980); *International Shoe*, 326 U.S. at 319, 66 S.Ct. at 159-60.

This case presents the question whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami. This is a

7. That section reads:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

. . .

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

subtle and difficult problem. As Mr. Justice White has noted, "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff," a question which applies *a fortiori* to individual defendants, "has deeply divided the federal and state courts." *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 445 U.S. 907, 909, 100 S.Ct. 1087, 1089, 63 L.Ed.2d 325 (1980) (White, J., joined by Powell, J., dissenting from denial of certiorari); *see also Baxter v. Mouzavires*, 455 U.S. 1006, 102 S.Ct. 1643, 71 L.Ed.2d 875 (1982) (White, J., joined by Powell, J., dissenting from denial of certiorari); *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994, 102 S.Ct. 1623, 71 L.Ed.2d 856 (1982) (White, J., joined by Burger, C.J. and Powell, J., dissenting from denial of certiorari). *Cf. Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 601-02 & n. 9 (7th Cir. 1979). Mindful of this confusion and the continuing uncertainty as to the meaning of *Hanson v. Denckla* and its progeny, we focus our analysis on the guidelines set forth in Supreme Court precedent and the case law of this circuit.

II.

[4, 5] Due process restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. at 251, 78 S.Ct. at 1238. Hence, the minimum contacts measure is not a question of "a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to" the laws of the forum state. *International Shoe*, 326 U.S. at 319, 66 S.Ct. at 160. A state cannot justifiably assert jurisdiction over an individual with whom it has

no constitutionally cognizable contacts or ties. *World-Wide Volkswagen*, 444 U.S. at 294, 100 S.Ct. at 565-66.

The *Hanson* requirement of purposeful activity within the forum state reflects two contrasting considerations. Particularly in the commercial context, fairness dictates that a defendant who derives profits from deliberate contacts within the forum state should be responsible for the costs such activities incur. On the other hand, due process abhors the unfair surprise that results when a party is haled into court in a state with which he lacks deliberate connections. *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567; *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir.1974).

The interplay of these considerations—responsibility and preparedness—can plainly be seen in the leading Supreme Court cases of *Shaffer v. Heitner*, *World-Wide Volkswagen*, and *McGee v. International Life Insurance Co.* In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), plaintiff predicated Delaware jurisdiction in part on the fact that defendants had accepted directorships in Greyhound, Inc., a corporation chartered in Delaware but headquartered in Arizona. Reasoning that directorial appointment in and of itself did not notify defendants that they risked being sued in the state of formal incorporation, the Court concluded that they had not purposefully availed themselves of the opportunity to conduct activities in the state of Delaware so as to confer jurisdiction there. 433 U.S. at 216, 97 S.Ct. at 2586. Three years later, the Court further restricted the scope of personal jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), the Court denied jurisdiction over a suit arising from an automobile accident in the forum state of Oklahoma, reasoning that the local New Jersey car dealer

who sold plaintiff the car could not have expected that the sale might give rise to products liability litigation halfway across the country. 444 U.S. at 297-98, 100 S.Ct. at 567-68.

McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), reached the opposite outcome on the basis of slender contacts which nevertheless left the defendant prepared for the possibility of out-of-state litigation. In that case, the Texas successor to a defunct life insurance company wrote Franklin, a California resident, offering to reinsure the policy he held from its predecessor. Franklin accepted the offer and commenced mailing premiums from California to Texas. After Franklin died, the insurer refused to honor the policy. Franklin's beneficiary sued in California state court. Despite the scant contacts between the company and the forum state, the Court concluded that jurisdiction was properly asserted.[8] The defending insurer had derived profit from the California market by soliciting revenue from one of its residents. *Hanson*, 357 U.S. at 251-52, 78 S.Ct. at 1238-39. By virtue of its direct mail offer, furthermore, the insurer had reason to know that its business dealings brought it into contact with the

8. In reaching its conclusion, the Court noted that California had an interest in affording redress to California residents when out-of-state insurers refused to honor their claims. The Court accorded that interest substantial weight because the prohibitive costs of distant litigation otherwise would force many claimants to forgo worthwhile claims. 355 U.S. at 223, 78 S.Ct. at 201. Where a party claiming breach of contract can afford to sue outside of the forum state, as here, the state interest in redress is correspondingly weak. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 n. 27 (5th Cir.1974). *Cf. Lakeside Bridge & Steel Co.*, 597 F.2d at 602 n. 11 ("The forum state has a lesser interest in protecting a corporation in an interstate contract dispute, especially when the corporation left the state to solicit and secure the contract, because the effects of a commercial contract are unlikely to involve danger to persons or things within the state's border.")

forum state and it could adjust its premiums accordingly to reflect the added financial risk of litigation. *See World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567.

In contrast with their typical ease in reconciling jurisdiction over non-resident sellers, courts have encountered particular difficulties in applying *Hanson's* requirement of purposeful activity to suits against non-resident buyers. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232-33 (6th Cir.1972). In part this reflects a judgment that the activity of incurring a debt with an in-state seller, however purposeful, is not an activity which occurs in the seller's state. *See Lakeside Bridge & Steel Co.*, 597 F.2d at 601-04. The geographical location of activities such as debt incurrence cannot provide a workable basis for determining whether jurisdiction is fair in any given circumstance. A rule which would require determining the geographical origin of a given debt would in our mind unwisely revive the effort to pinpoint the situs of intangibles which in rem jurisdiction entailed. The often metaphysical character of this inquiry in the context of in rem jurisdiction justifiably led the Supreme Court to abandon it in favor of the functional test of fairness enunciated in *International Shoe*. *See Shaffer v. Heitner*, 433 U.S. at 212, 97 S.Ct. at 2584.

We recognize, of course, that there are many circumstances in which a buyer fairly can be held to account in a foreign jurisdiction for the debts he has incurred. While the stereotypical image of buyers as the passive recipients of sellers' attentions assumes that buyers lack notice of the seller's residence and financial resources to defend suit there, *In-Flight Devices Corp.*, 466 F.2d at 233; Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U.Ill.L.F. 574, 576, this assumption is not always true. Some buyers can

demand terms; others must accede to them. Thoughts of profit motivate some orders; more personal desires impel others. Purchases may involve large amounts or small, a single transaction or many. The buyer may be a local business or an interstate concern, ordering directly from the seller's headquarters or solely through the local hometown agent.

This array of considerations complicates efforts to adjudicate such jurisdictional challenges in a reasoned and coherent manner. We believe, however, that the crux of the distinction between passive and active buyers stems from a concern for unfair surprise, both in terms of reasonable notice and financial preparedness. Mail-order customers, for example, probably would not expect to be subject to suit in a foreign jurisdiction and often would not find it financially worthwhile to defend an action there. We therefore agree with other jurists and commentators who have noted the unfairness of asserting jurisdiction over out-of-state customers to collect payments due on modest personal purchases. *Baxter v. Mouzavires*, 455 U.S. at 1006, 102 S.Ct. at 1643; *In-Flight Devices Corp.*, 466 F.2d at 232; Currie, *supra*, at 574-77. *Cf. Rush v. Savchuk*, 444 U.S. 320, 329, 100 S.Ct. 571, 577-78, 62 L.Ed.2d 516 (1980) (insured not expected to defend suit in every state where insurer does business). A contrary result would sanction suit against mail-order customers in the home office's state even though they had never set foot there and even though the price they paid could not be lowered to reflect the risk of suit. Consumers would inevitably suffer a spate of default judgments if defense of small claims required a cross-country trek whose costs exceeded the expense of judgment itself. *McGee*, 355 U.S. at 223, 78 S.Ct. at 201. Counsel for Burger King agrees that such an outcome would be fundamentally unfair.

Our concern for adequate notice and fairness to buyers does not of course necessitate a broad rule immunizing purchasers generally from suit in the seller's home state. Where commercial parties of comparable bargaining strength contract for performance of manufacturing or services within that state's bounds, we have consistently held that jurisdiction comports with due process, even if negotiations occur elsewhere. *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 644-45 (5th Cir.1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d 299 (1981); *Gold Kist Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375, 382 (5th Cir.1980); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir.1980) (per curiam); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974). *But see Lakeside Bridge & Steel v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907, 100 S.Ct. 1087, 63 L.Ed.2d 325 (1980). In short, the principle of fairness which is the essence of due process must be the compass which guides our inquiry.

We recognize that this case, in aspects, resembles commercial transactions which properly give rise to jurisdiction. Rudzewicz and MacShara were two Michigan entrepreneurs eager for the profits a franchise could promise. They signed contracts calling for payments exceeding $1 million over the life of the venture. Despite the expense of the transaction and its commercial end, however, we are troubled by elements of surprise which, if sanctioned, could ultimately sow the seeds of default judgments against franchisees owing smaller debts.

[6] Nothing in the course of the negotiations gave Rudzewicz reason to anticipate a Burger King suit outside of Michigan. The only face-to-face or even oral contact Rudzewicz had with Burger King throughout months of

protracted negotiations was with representatives of the Michigan office. Burger King had the Michigan office interview Rudzewicz and MacShara, appraise their application, discuss price terms, recommend the site which the defendants finally agreed to, and attend the final closing ceremony. There is no evidence that Rudzewicz ever negotiated with anyone in Miami or even sent mail there during negotiations. He maintained no staff in the state of Florida, and as far as the record reveals, he has never even visited the state.

The contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains. The sale, which involved the use of an intangible trademark in Michigan and occupancy of a Burger King facility there, required no performance in the state of Florida. Under the contract, the local Michigan district office was responsible for providing all of the services due Rudzewicz, including advertising and management consultation. Supervision, moreover, emanated from that office alone. To Rudzewicz, the Michigan office was for all intents and purposes the embodiment of Burger King. He had reason to believe that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters.[9] *See* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S.Ct.Rev. 77, 89-90; Comment, *Constitutional Limits on State Long Arm Jurisdiction*, 49 U.Chi.L. Rev. 156, 167 n. 56 (1982).

9. This case bears a resemblance to *Arthur, Ross & Peters v. Housing, Inc.*, 508 F.2d 562 (5th Cir.1975) (adopting the opinion of the district court). Defendant, a North Carolina realtor, persuaded plaintiff, a Texas partnership, to purchase land in North Carolina. A lawsuit later ensued in Texas federal court. We agreed that the trial court lacked jurisdiction since performance of the contract was to occur entirely outside Texas borders. *Id.* at 565. *See also Hamilton Brothers, Inc. v. Peterson*, 445 F.2d 1334, 1336-37 (5th Cir.1971).

Given that the office in Rudzewicz' home state conducted all of the negotiations and wholly supervised the contract, we believe that he had reason to assume that the state of the supervisory office would be the same state in which Burger King would file suit. Rudzewicz lacked fair notice that the distant corporate headquarters which insulated itself from direct dealings with him would later seek to assert jurisdiction over him in the courts of its own home state.[10] We believe that this is one of those cases where "there is something to the notion that a party who has gone into a foreign State to do business with one of its residents can be expected to go back to bring suit." Currie, *supra*, at 574.[11]

Just as Rudzewicz lacked notice of the possibility of suit in Florida, he was financially unprepared to meet its added costs. The franchise relationship in particular is fraught with potential for financial surprise. The device of the franchise gives local retailers the access to national

10. Burger King asserts that actual notice was provided by contractual provisions establishing that Florida was the state of the contract and that its choice-of-law rules would govern. We doubt, however, that boilerplate declarations in a lengthy printed contract suffice to provide actual notice of suit. In addition, *Hanson v. Denckla* established that the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction. 357 U.S. at 254, 78 S.Ct. at 1240.

11. In reaching this conclusion, we find support in *Shaffer v. Heitner*. Defendants in both cases were sophisticated businessmen who had reason to understand that they were entering into a business relation with a corporation chartered in the forum state. Yet in each case it was reasonable to assume that all working contact with the corporation would emanate from another state—in *Shaffer*, from corporate headquarters in Arizona; in this case, from the district office in Birmingham, Michigan.

trademark recognition which enables them to compete with better-financed, more efficient chain stores. This national affiliation, however, does not alter the fact that the typical franchise store is a local concern serving at best a neighborhood or community. Neither the revenues of a local business nor the geographical range of its market prepares the average franchise owner for the cost of distant litigation. *Cf. In-Flight Devices Corp.*, 466 F.2d at 234 (a business that lacks substantial out-of-state sales may be financially unprepared to defend suit outside of its home base). In *World-Wide Volkswagen*, for example, the Court held a local car dealer immune from suit despite its participation in a nationwide servicing plan. The Court reached this conclusion because, in part, the limited range of the retailer's market was unconducive to insuring against the cost of defending an out-of-state personal injury suit. 444 U.S. at 297-98, 100 S.Ct. at 567-68. The same consideration militates against jurisdiction in this case.

The particular distribution of bargaining power in the franchise relationship further impairs the franchisee's financial preparedness. In a franchise contract, "the franchisor normally occupies [the] dominant role . . ." Annot., 67 A.L.R.3d 1299, 1302 (1975). *See, e.g., Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598, 67 A.L.R.3d 1291 (1973), *cert. denied*, 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed. 2d 475 (1974). In recent years, certain states, including Michigan, have moved to enact statutes to police the more flagrant excesses of franchises. Annot., 67 A.L.R.3d at 1301.

We discern a characteristic disparity of bargaining power in the facts of this case. There is no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit

in Florida.[12] He signed a standard form contract whose terms were non-negotiable and which appeared in some respects to vary from the more favorable terms agreed to in earlier discussions. In fact, the final contract required a minimum monthly rent computed on a base far in excess of that discussed in oral negotiations. Burger King resisted price concessions, only to sue Rudzewicz far from home.[13] In doing so, it severely impaired his ability to call Michigan witnesses who might be essential to his defense and counterclaim.[14]

In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida.

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12. *See supra* note 4. Following protests on Rudzewicz' part, Burger King reduced the monthly minimum rent for the third year of the contract from $5,286.58 to $4,416.66. The reduction represented savings of $10,439.04. While sizable, this amount pales against the $641,900 disparity between the total rent Rudzewicz expected to pay and the amount Burger King charged.

13. We note that several Burger King franchisees have challenged personal jurisdiction in Florida courts without success. *See Burger King Corp. v. Elliott*, No. 80-2694-CIV-EBD (S.D.Fla. Jan. 9, 1981); *Burger King Corp. v. Wagner*, No. 80-942-CIV-EBD (S.D.Fla. July 16, 1980); *Burger King Corp. v. Robinson*, No. 79-5824-CIV-EPS (S.D.Fla. May 30, 1980); *Burger King Corp. v. Snow*, No. 80-295-CIV-SMA (S.D.Fla. March 18, 1980); *Burger King Corp. v. Levine*, No. 80-5852(08) (Cir.Ct.Fla. July 21, 1980).

14. Burger King urges us to impute MacShara's matriculation at Burger King University to Rudzewicz for purposes of minimum contacts. The company reasons that the ties of one partner can be attributed to all partners for suits arising out of their common ventures. We need not decide that question here, however, since Rudzewicz and MacShara never formed a partnership. They signed the agreements in their individual capacities. We conclude that contacts cannot be attributed from one individual defendant to another because "[t]he requirements of *International Shoe* . . . must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 579, 62 L.Ed.2d 516 (1980) (emphasis added).

Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process. We therefore reverse the judgment and remand with directions to vacate the judgment and dismiss the case.

REVERSED and REMANDED.

JOHNSON, Circuit Judge, dissenting:

I dissent from the decision of the majority that appellant did not have sufficient minimum contacts with the state of Florida to support the exercise of personal jurisdiction by a federal district court sitting in diversity. To decide whether the exercise of jurisdiction comports with the requirements of due process, this Court must determine whether the defendant "has purposefully availed himself of the benefits and protection of the forum state's laws, whether the forum state has any special interest in exercising jurisdiction, and whether the convenience of the parties favors litigating in another state." *Austin v. North American Forest Products*, 656 F.2d 1076, 1089 (5th Cir.1981) (citing *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974)).[1]

This Court has recognized that the purposeful availment prong of the *Product Promotions* test may be satisfied even if the defendant performs no physical acts within the forum state, as long as his contacts with the forum were "'deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise'." *Austin, supra*, at 1089-90 (quoting *Product Promotions, supra*, at 496) (footnotes omitted). In *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921 (5th Cir.1981) (per curiam), the Court determined that the purposeful availment prong was satisfied when the defendant entered a contract that specifically provided that it would be governed by the laws of the forum state. *Id.* at 923. In this case, both the franchise agreement and the lease signed by appellant and Burger King specifically provided that the laws of Florida would govern their interpretation. Thus, appellant has purposefully availed himself of the benefits and protections of Florida's laws.

The forum state has a special interest in exercising jurisdiction when the contract in dispute calls for the application of the forum state's laws. *See Marathon, supra*, at 923 (forum has interest when contract requires application of forum's laws); *Product Promotions, supra*, at 498 (forum has interest when its laws will be "of some relevance in resolving the suit"). Thus, Florida here has a special interest in exercising jurisdiction over appellant.

Finally, no great imbalance of convenience here argues for one forum over the other. Appellant cannot successfully argue that, because a large corporation sues him as an individual, the inconvenience to him can defeat personal jurisdiction. *See Marathon, supra*, at 923.

Ignoring this binding precedent, the majority opinion questions whether appellant had reasonable notice of the possibility that he would be haled into court in Florida and whether he was adequately prepared for that contingency, and it warns that a determination that jurisdiction exists in this case may mean that consumers, nonresident purchasers whom the majority likens to appellant, also will be subjected to the jurisdiction of foreign

1. The Eleventh Circuit Court of Appeals has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent, which is binding unless and until overruled or modified by this Court en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

courts simply because they have purchased goods under contracts requiring them to remit payment to the foreign state. In raising this specter, the majority does not give proper weight to the recognized fact that appellant was a senior partner in a Michigan accounting firm, who for five months conducted negotiations with Burger King over the terms of the franchise and lease agreements, and who obligated himself personally to contracts requiring over time payments that exceeded $1 million. Appellant, who clearly does not resemble the average consumer, signed contracts that explicitly provided that Florida law would govern their interpretation. He therefore had reasonable notice of the possibility that he would be sued under the contracts in the state of Florida, and he should have been adequately prepared for that contingency.

(Filed August 20, 1981)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

vs.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

ORDER

This matter is before the Court on the motion of Defendants' for Summary Judgment, etc., The motion has been fully briefed by both sides.

The Court has examined the briefs filed in support of the motion and filed in opposition to it and has determined that a non-resident Burger King franchisee is subject to the personal jurisdiction of this Court in actions arising out of its franchise agreements. It has also been held that venue in the Southern District of Florida is proper in such actions. Numerous recent cases in this Court supply authority for the foregoing propositions. See *Burger King Corporation v. David M. Elliott*, Case No. 80-2694-Civ-EBD; *Burger King Corporation v. Gary L. Wagner*, Case No. 80-942-Civ-EBD; *Burger King Corporation v. Paul D. Snow, Jr., et. al.*, 80-295-Civ-SMA; *Burger King Corporation v. Blanchard W. Robinson and Utopia Systems, Inc.*, Case No. 79-5824-Civ-EPS; *Burger King Corporation v. Gerald A. Mason, et. al.*, Case No. 78-2932-Civ-EBD.

The Court considers the Defendants' remaining argument to be without merit. Accordingly, it is

ORDERED AND ADJUDGED that the motion for summary judgment, etc., is DENIED. Defendants shall have twenty (20) days from the date hereof in which to file their Answer to the Complaint. It is further

ORDERED AND ADJUDGED that the Court will defer ruling on Plaintiff's motion for preliminary injunction until final hearing. This cause will be accelerated and set for final hearing by separate order after an answer has been received. The parties should anticipate that this cause will be set for final hearing before the end of this year.

DONE AND ORDERED in chambers at Miami, Florida, this 20th day of August, 1981.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

CC: Barry L. Meadow, Esquire
Paul W. Harty, Esquire
Thomas H. Oehmke, Esquire

(Filed March 3, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

vs.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER THEREON

THIS CAUSE came on for trial before this Court sitting without a jury on February 2, 3 and 4, 1982, pursuant to Defendant, BRIAN MacSHARA's Waiver of Jury Demand dated January 29, 1982, pursuant to Defendant, JOHN RUDZEWICZ's, Waiver of Jury Demand dated January 20, 1982, and pursuant to Plaintiff, BURGER KING CORPORATION's, Waiver of Jury Demand pursuant to Rule 39(a) of the Federal Rules of Civil Procedure announced on the record at the trial of this cause which commenced on February 2, 1982. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

This Court makes the following findings of fact:

1. That Plaintiff, BURGER KING CORPORATION, is a Florida corporation with its principal place of business located in Miami, Dade County, Florida.

2. That Defendant, JOHN RUDZEWICZ, is a citizen and resident of the State of Michigan.

3. That Defendant, BRIAN MacSHARA, is a citizen and resident of the State of Michigan.

4. That on June 4, 1979, Defendant, JOHN RUDZEWICZ, signed and entered into a Burger King Restaurant Franchise Agreement with the Plaintiff, BURGER KING CORPORATION.

5. That on June 4, 1979, Defendant, BRIAN MacSHARA, signed and entered into a Burger King Restaurant Franchise Agreement with the Plaintiff, BURGER KING CORPORATION.

6. That on June 4, 1979, Defendant, JOHN RUDZEWICZ, signed and entered into a Lease or Sub-Lease Agreement with the Plaintiff, BURGER KING CORPORATION.

7. That on June 4, 1979, Defendant, BRIAN MacSHARA, signed and entered into a Lease or Sub-Lease Agreement with the Plaintiff, BURGER KING CORPORATION.

8. That the above-described Franchise Agreement and Lease or Sub-Lease Agreement pertain to Burger King Restaurant Number 775 located at 4983 Dixie Highway, Drayton Plains, Michigan.

9. That Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, signed and entered into the above-described Franchise Agreement and Lease or Sub-Lease Agreement in their individual capacities.

10. That pursuant to Paragraph 8A of the above-described Franchise Agreement, franchise royalties were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

11. That pursuant to Paragraph 13 of the above-described Franchise Agreement, all taxes were to be reimbursed by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said reimbursements to BURGER KING CORPORATION in Miami, Dade County, Florida.

12. That pursuant to Section 3.1 of the above-described Lease or Sub-Lease Agreement, rental payments were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

13. That pursuant to Section 6.1 of the above-described Lease or Sub-Lease Agreement, all taxes were to be reimbursed by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said reimbursements to BURGER KING CORPORATION in Miami, Dade County, Florida.

14. That there was an agreement between the parties that all payments by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, for all supplies and other materials ordered by said Defendants from Plaintiff's DAVMOR DIVISION, were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

15. That there was an agreement between the parties that all supplies and other materials ordered by said Defendants from Plaintiff's DISTRON DIVISION, were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to Plaintiff, BURGER KING CORPORATION.

16. That pursuant to Paragraph 8B of the above-described Franchise Agreement, advertising fees were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to Plaintiff, BURGER KING CORPORATION.

17. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to Plaintiff, BURGER KING CORPORATION, the sum of Forty-Four Thousand, Five Hundred Sixty-Seven Dollars and Seventy-Three Cents ($44,567.73), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 8A of the Franchise Agreement for franchise royalties.

18. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to Plaintiff, BURGER KING CORPORATION, the sum of Thirty-Four Thousand, Five Hundred One Dollars and Thirty-Six Cents ($34,501.36), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 8B of the Franchise Agreement for advertising.

19. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of One Hundred-Eleven Thousand, Seven Hundred-Ten Dollars and Sixty Cents ($111,710.60), which is due and owing to BURGER KING CORPORATION pursuant to Section 3.1 of the Lease or Sub-Lease Agreement for rent.

20. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to reimburse BURGER KING CORPORATION the sum of Eleven Thousand, Seventy-Six Dollars and Forty-Four Cents ($11,076.44), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 13 of the

Franchise Agreement and pursuant to Section 6.1 of the Lease or Sub-Lease Agreement for taxes.

21. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of Six Thousand, Twenty-Six Dollars and Eighty Cents ($6,026.80), which is due and owing to BURGER KING CORPORATION for supplies and other materials ordered by said Defendants from BURGER KING CORPORATION's DAVMOR DIVISION.

22. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of Twenty Thousand, Nine Hundred Ninety-Two Dollars and Forty-Seven Cents ($20,992.47), which is due and owing to BURGER KING CORPORATION for supplies and other materials ordered by said Defendants from BURGER KING CORPORATION's DISTRON DIVISION.

23. That as of January 15, 1982, Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe to Plaintiff, BURGER KING CORPORATION, the total sum of Two Hundred Twenty-Eight Thousand, Eight Hundred Seventy-Five Dollars and Forty Cents ($228,875.40).

24. That Plaintiff, BURGER KING CORPORATION, mailed to the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, and the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, received the appropriate Notice of Default letters, Default letters, and Termination of Franchise letters pursuant to the provisions of Paragraph 16 of the above-described Franchise Agreement and pursuant to the provisions of Section 8.1 of the above-described Lease or Sub-Lease Agreement.

25. That prior to the execution by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the above-described Franchise Agreement and Lease or Sub-Lease Agreement on June 4, 1979, neither did the Plaintiff, BURGER KING CORPORATION, nor did any of the Plaintiff's agents, servants, or employees, make any material statements of fact to the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, which were false.

26. That prior to the execution by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the above-described Franchise Agreement and Lease or Sub-Lease Agreement on June 4, 1979, neither did the Plaintiff, BURGER KING CORPORATION, nor did any of the Plaintiff's agents, servants, or employees, represent or give the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, false figures pertaining to the past gross-sales history of Burger King Restaurant Number 775 or false figures pertaining to the projected or estimated future gross-sales of Burger King Restaurant Number 775.

27. That any statements of fact made by Plaintiff, BURGER KING CORPORATION, and its agents, servants or employees, to Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, pertaining to gross-sales figures for Burger King Restaurant Number 775, either in the past or to be expected in the future, were joined and merged into the above-described Franchise Agreement and said Franchise Agreement, pursuant to Paragraph G, Introduction, was the entire agreement between the parties and superseded all prior negotiations, commitments, representations and undertakings between the parties.

28. That at all times during the transactions between the Defendants, JOHN RUDEZWICZ and/or BRIAN MacSHARA, and the Plaintiff, BURGER KING CORPORATION, the Defendants, JOHN RUDZEWICZ and BRIAN

MacSHARA, were and are experienced and sophisticated businessmen and at no time were the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, acting under economic duress or disadvantage imposed by the Plaintiff, BURGER KING CORPORATION.

29. That the cause of the low gross-sales volume of Burger King Restaurant Number 775 located in Drayton Plains, Michigan, was and is due to additional competition and the prevailing economic conditions in the surrounding area of said restaurant.

30. That Paragraph 14 of the Franchise Agreement and Section 12.2 of the Lease or Sub-Lease Agreement prohibited assignment of the Franchise Agreement and/or the Lease or Sub-Lease Agreement without the written consent and approval of Plaintiff, BURGER KING CORPORATION.

31. That the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, never requested and the Plaintiff, BURGER KING CORPORATION, never consented, in writing, to the assignment and/or the purported assignment by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the Franchise Agreement and the Lease or Sub-Lease Agreement to RMBK Corporation.

32. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, had in their possession copies of the Burger King Corporation Uniform Franchise Offering Circular approximately four and one-half months prior to their execution of the above-described Franchise Agreement and Lease or Sub-Lease Agreement and that said circular contained copies of the Franchise Agreement and Lease or Sub-Lease Agreement.

33. That Plaintiff, BURGER KING CORPORATION, did not violate the laws of the State of Michigan pertain-

ing to the Michigan Franchise Investment Law or any other laws of the State of Michigan brought to the attention of this Court pertaining to the sale or purchase of a franchise, assuming, without deciding, that BURGER KING CORPORATION is subject to those laws.

34. That, at the present time, neither Defendant, JOHN RUDZEWICZ or BRIAN MacSHARA, is managing or operating Burger King Restaurant Number 775 on a full-time, day to day basis, in violation of Paragraph 3 of the Franchise Agreement.

35. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, having continued to use the BURGER KING CORPORATION trademarks, tradenames, service marks, methods, and logos, in violation of the above-described Franchise Agreement after proper termination of said Franchise Agreement by Plaintiff, BURGER KING CORPORATION.

36. That it is in the best interests of the consuming public that, at the Plaintiff, BURGER KING CORPORATION's election, either the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, immediately close Burger King Restaurant Number 775 from continued operation or immediately give the keys and possession of said restaurant to Plaintiff, BURGER KING CORPORATION, for their continued operation of said Burger King Restaurant Number 775.

CONCLUSIONS OF LAW

This Court concludes, as a matter of law, the following:

A. That this Court has jurisdiction over the subject matter and the parties to this cause.

B. That said Franchise Agreement and Lease or Sub-Lease Agreement executed by Defendants, JOHN RUDZE-

WICZ and BRIAN MacSHARA, on June 4, 1979, have been properly terminated by Plaintiff, BURGER KING CORPORATION.

C. That Plaintiff, BURGER KING CORPORATION, has proven the necessary elements of an action for breach of the Franchise Agreement and Lease or Sub-Lease Agreement, and Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have breached the Franchise Agreement and Lease or Sub-Lease Agreement executed on June 4, 1979.

D. That as a direct and proximate result of the breach of the Franchise Agreement and Lease or Sub-Lease Agreement executed on June 4, 1979, by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe Plaintiff, BURGER KING CORPORATION, the sum of TWO HUNDRED TWENTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND FORTY CENTS ($228,875.40), as of January 15, 1982.

E. That Plaintiff, BURGER KING CORPORATION, has proven the necessary elements of an action for an Open Account.

F. That as a result of the action proven for an Open Account, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe Plaintiff, BURGER KING CORPORATION, the sum of TWO HUNDRED TWENTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND FORTY CENTS ($228,875.40), as of January 15, 1982.

G. That Plaintiff, BURGER KING CORPORATION, has failed to prove the necessary elements of an action for an Account Stated.

H. That said Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, are jointly and severally liable to

Plaintiff, BURGER KING CORPORATION, for the above-stated amounts found due and owing to Plaintiff, BURGER KING CORPORATION, in their individual capacities.

I. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, in support of their Counter-Claim against Counter-Defendant, BURGER KING CORPORATION, have failed to prove any of the required elements of an action for fraud, misrepresentation, or deceit.

J. That the Franchise Agreement and Lease or Sub-Lease Agreement executed by and between the parties on June 4, 1979, was the entire agreement between the parties and superseded all prior negotiations, commitments, representations and undertakings between the parties.

K. That any assignment and/or purported assignment by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the Franchise Agreement and the Lease or Sub-Lease Agreement to RMBK Corporation is void as it may pertain to this transaction between the parties and as it may pertain to any amounts found herein to be due and owing to Plaintiff, BURGER KING CORPORATION, from the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA.

L. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, in support of their affirmative defenses and in support of their Counter-Claim against Counter-Defendant, BURGER KING CORPORATION, have failed to prove that BURGER KING CORPORATION violated the laws of the State of Michigan pertaining to the Michigan Franchise Investment Law or any other laws of the State of Michigan brought to the attention of this Court pertaining to the sale or purchase of a franchise, assuming, without deciding, that BURGER KING CORPORATION is subject to those laws.

M. That the Defendants, JOHN RUDZEWICZ's and BRIAN MacSHARA's, unauthorized continued use of the BURGER KING CORPORATION trademarks, tradenames, service marks, methods and logos, after proper termination of the Franchise Agreement by the Plaintiff, BURGER KING CORPORATION, constitutes an infringing use of and/or infringement of those properties in violation of the common law rights and statutory rights of the Plaintiff, BURGER KING CORPORATION.

N. That irreparable harm may result to the Plaintiff, BURGER KING CORPORATION, if the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, continue to infringe upon BURGER KING CORPORATION's above-described property rights and at Plaintiff, BURGER KING CORPORATION's, election, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, shall either close Burger King Restaurant Number 775 from continued operation or immediately give the keys and possession of said restaurant to BURGER KING CORPORATION for their continued operation of said Burger King Restaurant Number 775.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED AND ADJUDGED, as follows:

1. Plaintiff shall submit a Final Judgment, in conformity with these Findings of Fact and Conclusions of Law, within three (3) days of the date of entry of this Order.

2. This Court further reserves jurisdiction of this cause with reference to determining and/or assessing attorneys fees and costs, upon appropriate motion.

3. Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, are, at the election of Plaintiff, BURGER KING

CORPORATION, hereby ordered to immediately close Burger King Restaurant Number 775 from continued operation or to immediately give the keys and possession of said restaurant to BURGER KING CORPORATION for their continued operation of said Burger King Restaurant Number 775.

4. This Court further reserves jurisdiction of this cause with reference to the enforcement of, and/or the compliance with, the provisions of Paragraph 3 above.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 3 day of March, 1982.

/s/ James W. Kehoe
JAMES W. KEHOE
United States District Judge

Copies furnished to:

BARRY L. MEADOW, ESQ.
PAUL H. HARTY, ESQ.
THOMAS H. OEMHKE, ESQ.
RICARDO CATA, ESQ.

(Filed March 5, 1982)

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

v.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

FINAL JUDGMENT

THIS CAUSE having come on for trial before this Court sitting without a jury on February 2, 3 and 4, 1982, and this Court having entered its Findings of Fact and Conclusions of Law and Order thereon, dated March 3, 1982, and being otherwise fully advised in the premises, it is accordingly

ORDERED AND ADJUDGED that Final Judgment be and the same is hereby entered in favor of Plaintiff, BURGER KING CORPORATION, and against the Defendants, BRIAN MacSHARA and JOHN RUDZEWICZ, jointly and severally, in the amount of TWO HUNDRED TWENTY-EIGHT THOUSAND EIGHT HUNDRED SEVENTY FIVE DOLLARS AND FORTY CENTS ($228,875.40) for all of which sum let execution issue. Attorneys fees and costs shall be hereinafter taxed.

ORDERED AND ADJUDGED that Final Judgment be and the same is hereby entered on the Counterclaims filed herein by Defendants/Counterclaimants, in favor of Counterdefendant, BURGER KING CORPORATION, and against-Counterclaimants, BRIAN MacSHARA and JOHN

RUDZEWICZ, who shall take nothing by said Counterclaims.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida on this 5th day of March, 1982.

/s/ James W. Kehoe
U.S. DISTRICT COURT
JUDGE

cc: Barry L. Meadow, Esquire
Ricardo Cata, Esquire
Paul Harty, Esquire
Thomas H. Oehmke, Esquire

(Filed March 22, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5424

BURGER KING CORPORATION,
a Florida corporation,
Plaintiff-Appellee,

versus

BRIAN MACSHARA,
Defendant,

JOHN RUDZEWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 13, 11 Cir., 1984, ... F.2d .....). Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

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*Honorable Virgil Pittman, U. S. District Judge for the Southern District of Alabama, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5424

D.C. Docket No. 81-1145-CIV-K

BURGER KING CORPORATION, a Florida corporation,
Plaintiff-Appellee,

versus

BRIAN MACSHARA,
Defendant,

JOHN RUDZEWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court with directions to vacate the judgment and dismiss the case in accordance with the opinion of this Court;

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*Honorable Virgil Pittman, U. S. District Judge for the Southern District of Alabama, sitting by designation.

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 13, 1984

For the Court: Spencer D. Mercer, Clerk

By: /s/ (Illegible) Deputy Clerk

ISSUED AS MANDATE: May 7, 1984.

(Filed May 21, 1984)

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 82-5224

BURGER KING CORPORATION, a Florida corporation,
Plaintiff,

vs.

BRIAN MacSHARA, and JOHN RUDZEWICZ,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that BURGER KING CORPORATION, a Florida corporation, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the decision of the United States Court of Appeals, Eleventh Circuit, entered on the 13th day of February, 1984, and rendered upon denial of rehearing on the 22nd day of March, 1984. The decision reverses the judgment of the United States District Court, Southern District of Florida.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

PODHURST, ORSECK, PARKS,
JOSEFSBERG, EATON, MEADOW
& OLIN, P.A.
25 W. Flagler Street, Suite 1201
Miami, Fla. 33130
(305) 358-2800
Attorneys for Plaintiff

By: /s/ Joel S. Perwin
JOEL S. PERWIN

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 17th day of May, 1984, to: THOMAS H. OEHMKE, ESQ., Oehmke Legal Associates, 517 East Lerned, Detroit, Michigan 48226; PAUL W. HARTY, ESQ., 31300 Orchard Lake Road, Suite 201, Farmington Hills, Michigan 48018; and to SID ROBBINS, ESQ., 7360 North Kendall Drive, Miami, Fla. 33152.

/s/ Joel S. Perwin
JOEL S. PERWIN

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Honorable JOSEPH I. BOGART

Case No. 81-1145 CIV-JWK

BURGER KING CORPORATION, a Florida corporation,
Plaintiff,

v.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

Barry L. Meadow
25 West Flagler Street
Suite 1201
Miami, FL 33130

Thomas H. Oehmke
OEHMKE LEGAL ASSOCIATES
517 E. Larned
Detroit, MI 48226

MOTION FOR SUMMARY JUDGMENT AND/OR DISMISSAL AND/OR CHANGE OF VENUE PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, LACK OF SERVICE OF PROCESS, IMPROPER VENUE AND LACK OF JURISDICTION UNDER FEDERAL RULE 12(b)

Request for Oral Argument

NOW COMES the above named defendant, JOHN RUDZEWICZ, Only, by and through his attorneys, OEHMKE LEGAL ASSOCIATES and hereby moves this Court as follows:

1. To dismiss the above stated cause of action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the above stated action or in lieu thereof to quash the return of service of summons on the grounds:

a. That the defendant JOHN RUDZEWICZ is a named resident of the State of Michigan and was not and is not subject to service of process within the Southern District of Florida, and;

b. That the defendant JOHN RUDZEWICZ, has not been properly served with process in this action, all of which more clearly appears in the affidavit of the defendant, JOHN RUDZEWICZ annexed hereto as Exhibit A.

3. To dismiss the action on the grounds that this Federal Court is without jurisdiction because:

a. The jurisdiction of this court is envoked, in part, on the basis of diversity and "long-arm" statute and;

b. The defendant was not present or domiciled in the State of Florida at the time when the purported service of process was made, and;

c. The claim did not arise within this District as is evident from the face of plaintiffs' Complaint and JOHN RUDZEWICZ's Affidavit, annexed hereto as Exhibit A.

4. To dismiss the action on the grounds that this Federal Court is without jurisdiction because:

a. The jurisdiction of this Court is envoked, in part, on the allegation that this case involves a Federal Question;

b. That venue over this matter is controlled by Title 28, Sec. 1391 which provides, in part, that a Civil Action which is not founded solely on diversity of

citizenship can be brought only in the Judicial District where all defendants reside, or in which the claim arose.

5. To dismiss the action on the grounds that the court lacks jurisdiction under Rule 4(e) and (f) of the Federal Rules of Civil Procedure.

This motion is based on the records and files in the entitled cause, and is supported by a brief attached hereto.

Defendant's attorney has requested that plaintiffs' attorney dismiss the above captioned complaint but has been refused.

OEHMKE LEGAL ASSOCIATES

/s/ (Illegible)
Thomas H. Oehmke (P22963)

Dated: 22 June 1981

REQUEST FOR ORAL ARGUMENT

NOW COMES Thomas H. Oehmke, Attorney for Defendant JOHN RUDZEWICZ, and makes a request for an opportunity to make an oral argument on his Motion for Summary Judgment and/or Dismissal and/or Change of Venue Presenting Defenses of Failure to State a Claim, Lack of Service of Process, Improper Venue and Lack of Jurisdiction Under Federal Rule 12(b) because of the complicated issues presented, the sweeping and incorrect allegations of fact—wrongly made in the Complaint—which form the basis for Florida jurisdiction, and the serious economic consequences for Defendant, a Michigan resident, to defend himself in a Florida lawsuit.

/s/ (Illegible)
Thomas H. Oehmke (P22963)